No. 5 of 2009

Tuesday, 5 May 2009

On the

Bus Safety Bill 2009

Children Legislation Amendment Bill 2009

Electricity Industry Amendment (Premium Solar Feed-in Tariff) Bill 2009

Justice Legislation Amendment Bill 2009

Major Sporting Events Bill 2009

Parliamentary Salaries and Superannuation Amendment Bill 2009

Planning Legislation Amendment Bill 2009

Road Legislation Amendment Bill 2009

Salaries Legislation Amendment (Salaries Sacrifice) Bill 2009

Serious Sex Offenders Monitoring Amendment Bill 2009

Transport Legislation Amendment (Driver and Industry Standards) Bill 2009

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Glossary

'*Article*' refers to an Article of the International Covenant on Civil and Political Rights;

'*Assembly*' refers to the Legislative Assembly of the Victorian Parliament;

'*Charter*' refers to the Victorian *Charter of Human Rights and Responsibilities Act 2006;*

'*child*' means a person under 18 years of age;

'*Committee*' refers to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament;

'*Council*' refers to the Legislative Council of the Victorian Parliament;

'*court'* refers to the Supreme Court, the County Court, the Magistrates' Court or the Children's Court as the circumstances require;

'*Covenant*' refers to the International Covenant on Civil and Political Rights;

'*human rights'* refers to the rights set out in Part 2 of the Charter;

'***penalty units'*** refers to the penalty unit fixed from time to time in accordance with the *Monetary Units Act 2004* and published in the government gazette *(*currently one penalty unit equals $113.42).

'Statement of Compatibility' refers to a statement made by a member introducing a Bill in either the Council or the Assembly as to whether the provisions in a Bill are compatible with Charter rights.

'***VCAT***' refers to the Victorian Civil and Administrative Tribunal;

Useful provisions

Section 7 of the ***Charter*** provides –

Human rights – what they are and when they may be limited –

(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

(a) the nature of the right; and

(b) the importance of the purpose of the limitation; and

(c) the nature and extent of the imitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Section 35 (b)(iv) of the ***Interpretation of Legislation Act 1984*** provides –

In the interpretation of a provision of an Act or subordinate instrument consideration may be given to any matter or document that is relevant including, but not limited to, reports of Parliamentary Committees.

Terms of Reference

Parliamentary Committees Act 2003

17. Scrutiny of Acts and Regulations Committee

The functions of the Scrutiny of Acts and Regulations Committee are –

(a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly –

  (i) trespasses unduly upon rights or freedoms;

  (ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;

  (iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions;

  (iv) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*;

  (v) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2001*;

  (vi) inappropriately delegates legislative power;

  (vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny;

  (viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities;

(b) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament –

  (i) as to whether the Bill directly or indirectly repeals, alters or varies section 85 of the *Constitution Act 1975*, or raises an issue as to the jurisdiction of the Supreme Court;

  (ii) if a Bill repeals, alters or varies section 85 of the *Constitution Act 1975*, whether this is in all the circumstances appropriate and desirable;

  (iii) if a Bill does not repeal, alter or vary section 85 of the *Constitution Act 1975,* but an issue is raised as to the jurisdiction of the Supreme Court, as to the full implications of that issue;

(c) to consider any Act that was not considered under paragraph (a) or (b) when it was a Bill –

  (i) within 30 days immediately after the first appointment of members of the Committee after the commencement of each Parliament; or

  (ii) within 10 sitting days after the Act receives Royal Assent —

  whichever is the later, and to report to the Parliament with respect to that Act or any matter referred to in those paragraphs;

(d) the functions conferred on the Committee by the *Subordinate Legislation Act 1994*;

(e) the functions conferred on the Committee by the *Environment Protection Act 1970*;

(f) the functions conferred on the Committee by the *Co-operative Schemes (Administrative Actions) Act 2001*;

(fa) the functions conferred on the Committee by the Charter of Human Rights and Responsibilities;

(g) to review any Act in accordance with the terms of reference under which the Act is referred to the Committee under this Act.

The Committee has considered the following Bills –

Children Legislation Amendment Bill 2009
Justice Legislation Amendment Bill 2009
Parliamentary Salaries and Superannuation Amendment Bill 2009
Planning Legislation Amendment Bill 2009
Road Legislation Amendment Bill 2009

The Committee notes the following correspondence –

Bus Safety Bill 2009
Electricity Industry Amendment (Premium Solar Feed-in Tariff) Bill 2009
Major Sporting Events Bill 2009
Salaries Legislation Amendment (Salaries Sacrifice) Bill 2009
Serious Sex Offenders Monitoring Amendment Bill 2009
Transport Legislation Amendment (Driver and Industry Standards) Bill 2009

Scrutiny of Acts and Regulations Committee

Role of the Committee

The Scrutiny of Acts and Regulations Committee is an all-party Joint House Committee, which examines all Bills and subordinate legislation (regulations) presented to the Parliament. The Committee does not make any comments on the policy aspects of the legislation. The Committee's terms of reference contain principles of scrutiny that enable it to operate in the best traditions of non-partisan legislative scrutiny. These traditions have been developed since the first Australian scrutiny of Bills committee of the Australian Senate commenced scrutiny of Bills in 1982. They are precedents and traditions followed by all Australian scrutiny committees. Non-policy scrutiny within its terms of reference allows the Committee to alert the Parliament to the use of certain legislative practices and allows the Parliament to consider whether these practices are necessary, appropriate or desirable in all the circumstances.

The *Charter of Human Rights and Responsibilities Act 2006* provides that the Committee must consider any Bill introduced into Parliament and report to the Parliament whether the Bill is incompatible with human rights.

Alert Digest No. 5 of 2009

Children Legislation Amendment Bill 2009

Introduced	31 March 2009
Second Reading Speech	2 April 2009
House	Legislative Assembly
Member introducing Bill	Hon. Lisa Neville MLA
Portfolio responsibility	Minister for Community Services

Purpose and Background

[Clauses]

The Bill amends the *Children, Youth and Families Act 2005* to —

- enable the disclosure of confidential information in connection with the administration or execution of that Act and regulations or under a court order by departmental administrative officers in addition to protective interveners; **[3, 13 to 15]**
- enable the appointment of an administrator to only part of a registered community service; **[4 to 7]**
- further provide for the constitution of the Suitability Panel by providing that more than 5 members may be appointed to the panel. **[8]**

The Bill also amends the *Child Wellbeing and Safety Act 2005* to —

- further provide for the circumstances requiring the Child Safety Commissioner to conduct inquiries into child deaths; **[9 to 11]**
- give power to the Child Safety Commissioner to conduct inquiries into current or closed child protection client cases at the request of the Minister. **[12]**

Extracts from the Second Reading Speech –

> Jurisdiction of Child Safety Commissioner to investigate child deaths and child protection
>
> *The first proposed amendment expands the criteria for the type of case that will be subject to child death inquiries by the Child Safety Commissioner. The proposed amendment will enable the Child Safety Commissioner to conduct child death inquiries into the deaths of all children who were the subject of a report to the Secretary to the Department of Human Services within three months of their deaths. The current legislative scheme provides for inquiries only into the death of a child who was the subject of a report to child protection that was subsequently deemed by child protection to be a 'protective intervention report'.*
>
> *…*
>
> *The second proposed amendment goes even further by creating a new category of cases potentially subject to review by the Child Safety Commissioner. The proposed amendment will enable the Child Safety Commissioner to examine individual cases involving child protection upon a request by the Minister for Community Services. The review will constitute an inquiry into the services provided or not provided to the child for the purpose of improving existing practices and procedures in relation to child safety issues. The only criterion is that the child has been known to child protection at some stage in their life.*
>
> *…*

Minister may appoint Administrator over only a part of a community service

This Bill rectifies an inadvertent inflexibility of the current provisions that enable the Minister to appoint an administrator over an entire community service organisation -- not just those parts of the organisation delivering child and family services funded by the Department of Human Services under the Children, Youth and Families Act. **[4 to 7]**

…

Departmental administrative staff may access child protection file

The Bill proposes an amendment to enable administrative staff in the child protection program to have access to a client's child protection file, for the purposes of undertaking administrative tasks.

It was never the intention to exclude these important staff members from having access to client information for the purpose of carrying out their significant duties. The absence of a legislative scheme to enable such access is an oversight which requires rectification. The Bill therefore seeks to clarify this situation by making permissible the disclosure of information to or by administrative staff in the administration or execution of the Children, Youth and Families Act or pursuant to a court order.

The legislation currently contains several specific confidentiality offence provisions which are not excluded by the proposed amendment. Rather, the proposed amendment is intended to operate as a defence provision to those specific disclosure offences. Thus if a disclosure is made outside the circumstances of the defence provision, then that disclosure will be in breach of the confidentiality offence provisions, to which penalties apply. Further, all administrative staff are bound to respect the confidentiality of client information by virtue of the Victorian Public Sector Code of Conduct.

The Committee makes no further comment.

Justice Legislation Amendment Bill 2009

Introduced	31 March 2009
Second Reading Speech	2 April 2009
House	Legislative Assembly
Member introducing Bill	Hon. Rob Hulls MLA
Portfolio responsibility	Attorney-General

Purpose and Background

[Clauses]

The Bill —

- amends the search warrant powers found in a number of Acts to enable a search of a specified vehicle located in a public place. The amendments overcome existing limitations in those Acts to specify a vehicle of itself in a public place to be the object of the warrant.

  The Acts being amended are the *Crimes Act 1958*, the *Drugs, Poisons and Controlled Substances Act 1981*, the *Firearms Act 1996*, the *Gambling Regulation Act 2003*, the *Police Integrity Act 2008*, the *Police Regulation Act 1958*, the *Prostitution Control Act 1994*, and the *Surveillance Devices Act 1999.* **[3 to 37]**

- amends the *Drugs, Poisons and Controlled Substances Act 1981* to enable any member of the police force to execute a search warrant under that Act. This addresses a current practical limitation in the power to execute these warrants, whereby only the member who applies for the warrant is able to execute it; **[6(3)]**

- amends the *Gambling Regulation Act 2003* to provide for further exemptions and restrictions in relation to gambling advertising. **[39 to 41, 48, 49],** These amendments also make it a condition of registration that a registered bookmaker have a Responsible Gambling Code of Conduct approved by the Commission; **[42 to 47, 50 and 51]**

- repeals the sunset provision in the *Children, Youth and Families Act 2005* to enable the Koori Court (Criminal Division) to continue to operate; **[38]**

- makes an amendment to the annual reporting requirements under the *Terrorism (Community Protection) Act 2003*, to require an annual report under section 13 of that Act to be provided within 3 months of the end of the financial year. **[53]**

Extracts from the Second Reading Speech –

Search warrant powers to allow vehicle of itself to be subject of search warrant

> *The existing search warrant powers in these Acts are confined to searching places, premises or land specified in the warrant. Several of these powers would enable a vehicle that is found on the relevant place, premises or land to be entered, searched and seized. However, none of these powers enables a vehicle of itself to be specified as the object of the warrant. … the Bill extends relevant search warrant powers in the Acts I have mentioned to enable a specified vehicle in a public place to be searched under warrant.*

Power for any officer to execute warrant

> *…The Bill also amends the search warrant power in section 81 of the Drugs, Poisons and Controlled Substances Act 1981 to empower any police member to execute a warrant issued under that section. Unlike other commonly used search warrant powers, section 81 only provides for the member specified in the warrant to execute it.*

Annual report under the Terrorism (Community Protection) Act 2003

> *…Part 5 of the Bill also makes a minor technical amendment to clarify the annual reporting requirement under the Terrorism (Community Protection) Act 2003.*
>
> *This change also gives effect to a recommendation in the Final Report on Warrant Powers and Procedures of the Victorian Parliament Law Reform Committee.*
>
> *That report also made recommendations for wide-ranging reforms of Victoria's warrant powers and procedures. The government supports in principle consolidating Victoria's warrants powers and procedures in a new Warrants Act, which will be a longer term project.*

Extension of the Children's Koori Court (Criminal Division)

> *Part 3 of the Bill repeals provisions in the Children, Youth and Families Act 2005 to enable the Children's Koori Court (Criminal Division) to continue operations.*

Restrictions on advertising in the *Gambling Regulation Act 2003*

> *Part 4 of the Bill will remove the current restrictions on advertising in Victoria by wagering service providers located in other states or territories of Australia.*
>
> *… For this reason, in conjunction with the lifting of advertising prohibitions, part 4 of the Bill also introduces guidelines in relation to advertising standards for wagering service providers that will ensure that consumers are appropriately protected.*
>
> *Furthermore, the Bill introduces a requirement that the holder of a Victorian bookmaker registration have a responsible gambling code of conduct which has been approved by the Victorian Commission for Gambling Regulation.*

Charter Report

Freedom of expression – Criminalisation of offensive gambling advertising – Whether reasonably necessary – Whether lawful restriction

Summary: The Committee considers that clause 49, criminalising 'offensive' gambling advertising, engages the Charter's right to freedom of expression. It is concerned that the clause may not be reasonably necessary for the protection of public morality; and that it may be difficult for wagering service providers to judge in advance whether a particular instance of gambling advertising is or isn't offensive.

The Committee notes that clause 49, inserting a new s. 4.7.8 into the Gambling Regulation Act 2003, makes it a criminal offence for a wagering service provider to disseminate any gambling advertising that 'is offensive'. **The Committee considers that clause 49 engages the Charter's right to freedom of expression**.[1]

The Statement of Compatibility remarks:

> *Advertising which is offensive may often be contrary to public morality and its prohibition (subsection 4.7.8(1)(f)) is a lawful restriction.*

The Committee is concerned that, while some offensive gambling advertising may be contrary to public morality, criminalising all such advertising may go further than is 'reasonably necessary' to protect public morality.[2] The Committee is also concerned

[1] Charter s. 15(2) provides that 'Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria…'

[2] Charter s. 15(3) provides that 'the right may be subject to lawful restrictions reasonably necessary… (b) for the protection of… public morality.'

that it may be difficult for wagering service providers to judge in advance whether a particular instance of gambling advertising is or isn't offensive.[3]

The Committee will write to the Minister seeking further information as to:

1. ***why criminalising offensive gambling advertising is reasonably necessary to protect public morality.***
2. ***how wagering service providers will be able to judge in advance whether a particular instance of gambling advertising is or isn't offensive.***

Pending the Minister's response, the Committee draws attention to clause 49 and, in particular, new subsection 4.7.8(1)(f).

The Committee makes no further comment.

[3] See *Sunday Times v UK* [1979] ECHR 1, [49], defining 'lawful restriction' in a provision similar to Charter s. 15(3) as requiring that the provision be 'adequately accessible and formulated with sufficient precision to enable a person to regulate his or her conduct by it'.

Parliamentary Salaries and Superannuation Amendment Bill 2009

Introduced	31 March 2009
Second Reading Speech	2 April 2009
House	Legislative Assembly
Member introducing Bill	Hon. Tim Holding MLA
Portfolio responsibility	Minister for Finance

Purpose and Background

The Bill seeks to limit the increase in the basic salary payable to Members of the Victorian Parliament to 2.5 per cent for the 2009-2010 financial year, commencing 1 July 2009.

> **Note:** *This is a special provision for the 2009-2010 financial year. Under the Parliamentary Salaries and Superannuation Amendment Act 1968, Victorian parliamentary salaries are ordinarily set by reference to Federal parliamentary salaries.*

The Committee makes no further comment.

Planning Legislation Amendment Bill 2009

Introduced	31 March 2009
Second Reading Speech	2 April 2009
House	Legislative Assembly
Member introducing Bill	Hon. Peter Batchelor MLA
Portfolio responsibility	Minister for Community Development

Purpose and Background

[Clauses]

The Bill amends the —

- *Planning and Environment Act 1987* to —
  - enable certain applications for planning permits and amendments to planning permits to be decided on by Development Assessment Committees to be established pursuant to the Bill; **[6]**
  - enable growth areas to be declared anywhere in Victoria instead of as presently restricted under section 46AP of the Act. **[3 and 4]**
- *Local Government Act 1989* to provide an exception from conflict of interest provisions in relation to a conflict which may arise for a councillor as a result of that councillor being a member of a Development Assessment Committee (DAC). There are specific probity provisions in the new Part 4AA Division 5 that cover conflict of interests arising from a councillor serving on a DAC. **[9]**
- *Docklands Act 1991* to amend the objective of the Victorian Urban Development Authority by removing the expiry date of the involvement of the Authority in the Docklands development. **[7]**
- *Heritage Act 1995* to increase the maximum penalty that may be prescribed for an infringement offence from the current 4 penalty units to a maximum of 10 penalty units. **[8]**
- *Melbourne Convention and Exhibition Trust Act 1996* to clarify and broaden the powers and functions of the Melbourne Convention and Exhibition Trust so that it can operate throughout Victoria. Currently the Trust is limited to operating within the City of Melbourne and the City of Port Phillip. **[10]**

Extracts from the Second Reading Speech –

> *Each Development Assessment Committee would be established by an Order of the Governor in Council, made on the recommendation of the Minister for Planning. The order would specify the area to be covered by the DAC and the specific matters upon which the DAC shall make a decision.*
>
> *…*
>
> *A Development Assessment Committee has the jurisdiction to decide planning permit applications, and applications to amend a planning permit, only as specified in an order. Councils will continue to retain the role of responsible authority and will process applications both before and after a decision.*
>
> *…*
>
> *A Development Assessment Committee will decide all applications within its jurisdiction as set out in the Order. Councils will not be able to make a decision on a matter assigned to a development assessment committee. The decision made by the development assessment*

committee will become the decision of the responsible authority. The development assessment committee make the decision on a planning permit application for the council.

…

Development assessment committees will not remove third-party appeal rights or affect the call-in powers provided in the Planning and Environment Act 1987.

The membership of the DAC is set out in proposed Part 4AA Division 3.

…

The procedures to be followed by a Development Assessment Committee are set out in proposed Part 4AA Division 4.

The Committee makes no further comment.

Road Legislation Amendment Bill 2009

Introduced	31 March 2009
Second Reading Speech	2 April 2009
House	Legislative Assembly
Member introducing Bill	Hon. Tim Pallas MLA
Portfolio responsibility	Minister for Roads and Ports

Purpose and Background

[Clauses]

The Bill amends the –

Road Safety Act 1986 (the 'Act') to —

1. clarify that level crossing offences can be enforced by prescribed road safety cameras by amending the definition section in the Act; **[4]**
2. provide legislative recognition and authority for standards used to determine fitness to drive and for the Minister to issue guidelines about testing persons in respect to these provisions; **[6], [47]**
3. clarify the law in relation to the application of operator onus provisions to excessive speeding offences following the Supreme Court's decision in *Dolheguy v Becker* [2009] VSC 106; **[7]**
4. increase the penalty for a first time drink driving offence from 12 to 20 penalty units. **[8]**
5. create offences for a person who assists with by-passing or otherwise circumventing an alcohol interlock; **[9]**. *See Committee comments below*.
6. lower the current blood and breath alcohol concentration threshold from 0.15 grams to 0.10 grams for immediate licence suspension for a person who holds a full driver licence; **[10]**
7. authorise approved health professionals to take blood samples from persons attending a medical facility following a motor vehicle accident; **[13]**
8. increase the penalty for failing to give information to a member of the police force in circumstances involving the investigation of an accident that resulted in a person being killed or suffering serious injury from 10 to 20 penalty units. **[14]**
9. introduce offences of careless and dangerous driving and failing to stop after an accident, rendering assistance or exchanging details for drivers of vehicles other than motor vehicles, such as bicycles; **[16], [18-19]**
10. extend the use of tyre deflation devices to preventing the commencement of a pursuit; **[17]**. *Refer to Charter report below*.
11. provide a mechanism by which organised motor sports events on private land can be exempted from the offence of deliberately losing traction; **[20]**
12. introduce a new offence to protect the operators of safety cameras and speed detectors from interference and abuse; **[23]**. *Refer to Charter report below*.
13. change descriptions of speed detection devices, such as "prescribed detection device" and "prescribed speed measuring device", to be consistent with the proposed Road Safety (General) Regulations 2009; **[22], [24-31], [34], [42]**
14. include dangerous driving involving excessive speed as a relevant offence for the seizure, impounding and forfeiture regime established under the Act. The current Act

only provides for the relevant offence to apply to excessive speed involving the loss of traction, **[33]**

15. facilitate the sale of impounded vehicles that have been abandoned; **[33], [38]**
16. introduce an offence of failing to comply with a notice to surrender a vehicle under section 84H (being a vehicle used in the commission of a relevant offence) unless the registered owner has a reasonable excuse. **[34]**. *Refer to Committee comments below*.
17. introduces new offences for failing to surrender a vehicle ordered to be impounded and immobilised without reasonable excuse (section 84S) or ordered to be forfeited (section 84T) at the time specified in a court order without reasonable excuse; **[35-36]**. *See Committee comment below*.
18. improve the operation of the vehicle impoundment regime through administrative amendments; **[37-40]**
19. allow public authorities, other than local councils, to outsource parking enforcement and impose parking fines where the Minister so approves; **[41]**
20. clarify regulation-making powers regarding infringement offences by providing a clear head of power to distinguish between classes of persons, vehicles or circumstances for the purposes of prescribing traffic infringements; **[44]**
21. inserts a new section 95D to allow the Governor in Council to make Rules rather than regulations. The rules made are statutory rules within the meaning of the *Subordinate Legislation Act 1994* and may be disallowed by a House of the Parliament (clause 46); **[45]**
22. amends section 96 concerning disallowance of regulations notices and orders to include the disallowance of guidelines issued under section 96B (clause 47) and the disallowance of rules made pursuant to section 95D (clause 45); **[46]**
23. allows the Minister to issue guidelines about testing a person under section 27 to determine whether a person is unfit to drive or be subject to certain licence conditions; **[6], [47]**
24. inserts a new Part 13 (new sections 274 to 295) to implement national model legislation for heavy vehicle speed compliance, whereby parties in the transport chain who can influence whether speeding occurs have a duty to ensure that the driver is not encouraged to speed. In many respects the provisions parallel those in Part 10A ("Fatigue Management Requirements"). **[53]**

Extract from the Second Reading Speech –

> *The legislation introduces 'chain of responsibility' provisions to target the cause of heavy vehicle speeding. It aims to ensure that those who are in a position to influence a decision that may result in a breach of speed limits are held accountable for their actions. The legislation focuses on parties in the transport chain other than drivers, such as the employer, prime contractor, operator, scheduler, consignor, consignee and loading manager. Consistently with the approach taken in relation to mass, dimension and load restraint offences, and driver fatigue management offences, an employer, prime contractor and operator is required to take all reasonable steps to ensure that a heavy vehicle driver working for them does not commit a speeding offence.*

Road Management Act 2004 to —

1. enable VicRoads, where it is not the relevant coordinating road authority, to discontinue a road or part of a road with the written consent of the relevant coordinating road authority; [55-57]
2. extend the exemption and immunity currently given to the Crown and road authorities in relation to the fencing of public highways so that they apply to all roads within the meaning of the Act (which includes public highways and ancillary areas); [59-60]

3. clarify references to certain offences in respect to which infringement notices may be issued. **[61]**

Accident Towing Services Act 2007 to —

1. clarify that holders of regular tow truck licences may operate tow trucks of any size and may tow accident damaged motor vehicles weighing 4 tonnes or more if their tow trucks are capable of doing so; **[63]**
2. provide that non-licensed tow trucks are not permitted to attend accident scenes; **[63]**
3. clarify the circumstances in which accident towing demerit points are incurred by towing industry participants; **[80-85]**
4. clarify when a person must carry and produce a tow truck driver accreditation certificate; **[73-74]**
5. ensure that, in addition to police officers, authorised officers may sign an authority to tow in circumstances where the owner or driver is not present at the accident scene or is incapacitated; **[76]**
6. clarify the circumstances in which the offences relating to touting for repair work, towing work and vehicle storage will apply; **[77]**
7. provide for the issuing of training permits to persons to allow them to be trained in the driving and operation of tow trucks prior to them becoming accredited tow truck drivers; **[75]**
8. clarify that the driver or passenger of a damaged or broken down vehicle may travel as a passenger in a licensed tow truck; and
9. make a number of other minor and technical amendments to improve the operation of the Act. **[86]**

Transport Act 1983 to correct a typographical error and also makes a minor amendment to the *Melbourne City Link Act 1995*.

Content and Committee comment

[9]. Introduces a new offence in the *Road Safety Act 1986* (new section 50AAK) for a person *without reasonable excuse* to blow into an approved alcohol interlock, or procure a person to blow into an approved alcohol interlock, installed in a motor vehicle for the purpose of enabling another person to drive the motor vehicle if that other person's driver licence is subject to an alcohol interlock condition and the accused person has the burden of proving reasonable excuse. Penalty: 10 penalty units.

[34]. Introduces an offence in the *Road Safety Act 1986* (new subsection 84H(3A)) of failing to comply with a notice to surrender a vehicle, (being a vehicle reasonably believed to be used in the commission of a relevant offence (defined in s.84C)) unless the registered operator has a reasonable excuse. Penalty: 60 penalty units.

[35]. Introduces a new offence in the *Road Safety Act 1986* (new subsection 84S(4)) for a registered operator to fail to surrender a vehicle ordered to be impounded and immobilised without reasonable excuse. Penalty: 60 penalty units.

[36]. Introduces a new offence in the *Road Safety Act 1986* (new subsection 84T(4)) for a registered operator to fail to surrender the vehicle once a forfeiture order is made by the court at the time specified in a court order without reasonable excuse. Penalty: 60 penalty units.

Rights and Freedoms – Presumption of innocence – Criminal Proceedings – Reverse onus on defendant to prove evidentiary matters – Clauses 9 and 34 to 36 amending the Road Safety Act 1986

The Committee accepts that the question whether it is justifiable to place an evidential burden on a defendant is one to be considered on a case by case basis. The Committee has previously accepted that a reverse onus provision may be justified whether the offence is regulatory in nature, and where the penalty is a relatively low level fine and does not involve imprisonment and where the evidence to be adduced by the defendant is more easily within his or her knowledge and that evidence would be unreasonably difficult for the prosecution to prove.

The Committee accepts that a proportionate balance must be struck between the effective prosecution of regulatory offences and the rights of a defendant in criminal or pecuniary penalty proceedings.

The Committee draws attention to the provisions.

Charter Report

Right to life – Tyre deflation device – Whether use subject to the Charter

Summary: The Committee is concerned that the placement of tyre deflation devices on roads is not subject to the Charter's obligation for police officers to act in a way that is compatible with the right to life. It will write to the Minister seeking further information.

The Committee notes that clause 17, amending s. 63B(1) of the *Road Safety Act 1986*, expands the circumstances when police may be authorised to use a tyre deflation device. While the Committee appreciates that tyre deflation devices in general, and clause 17 in particular, are designed to mitigate the dangers of illegal driving and police pursuits, it observes that poorly used tyre deflation devices may also cause road accidents and fatalities.[4] The Committee therefore considers that clause 17 engages the Charter's right to life.[5]

Existing subsection 63B(2) provides that:

> *A provision made by or under this or any other Act that would operate to prohibit or restrict the placement or deployment on or near a road or road related area of a tyre deflation device does not apply to the placing or deploying of a tyre deflation device by a member of the police force acting in the exercise of his or her duties.*

The Committee is concerned that this provision may mean that the placement of tyre deflation devices on roads is not subject to the Charter's obligation for police officers to act in a way that is compatible with the right to life.[6] The Committee observes that similar provisions in other statutes specifically exclude the Charter from their ambit.[7]

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4 See, e.g. 'Inquest into the death of Samantha Anne MASLEN', Coroner's Court (Qld), 28th August 2008, available at <http://www.courts.qld.gov.au/OSC-Inquest-MaslenSA20080818.pdf>

5 Charter s. 9 provides that 'Every person has the right to life and has the right not to be arbitrarily deprived of life.'

6 Charter s. 38(1) provides that 'Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.' Charter s. 38(2) provides that 'Subsection (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.'

7 E.g. s. 53, *Dangerous Goods Act 1985*; s. 204, *Eastlink Project Act 2004*; s. 153C, *Fisheries Act 1995*; s. 30Y, *Public Transport Competition Act 1995*.

The Committee will write to the Minister seeking further information as to whether or not the placement of tyre deflation devices is subject to the Charter's obligation for police to act in a way that is compatible with the right to life.

Pending the Minister's response, the Committee draws attention to clause 17 and, in particular, to existing sub-section 63B(2) of the Road Safety Act 1986.

Error in statement of compatibility

Summary: The Committee will write to the Minister about an error in the Statement of Compatibility.

The Committee notes that the Statement of Compatibility states that clause 23, inserting a new section 73A into the *Road Safety Act 1986*, makes it an offence to 'insult' an operator of a road safety camera or speed measuring device. However, clause 23 as introduced only makes it an offence to 'obstruct, hinder, threaten, abuse or intimidate' such operators.

The Committee observes that an offence of insulting an operator could raise significant issues with respect to the Charter's right to freedom of expression. However, an offence limited to the present terms of clause 23 does not.

The Committee will write to the Minister about the error in the Statement of Compatibility.

The Committee makes no further comment.

Ministerial Correspondence

Bus Safety Bill 2009

The Bill was introduced into the Legislative Assembly on 2 December 2008 by the Hon. Lynne Kosky MLA. The Committee considered the Bill on 2 February 2009 and made the following comments in Alert Digest No. 1 of 2009 tabled on 3 February 2009.

Committee's Comments

[67]

Insufficiently subjects the exercise of legislative power to parliamentary scrutiny – Total absence of explanatory material

The Committee notes that the explanatory memorandum avoids any mention of this provision (clause 67(4)). The Committee refers to Practice Note No. 1 of 2005 concerning inadequate explanatory material provided with a Bill. The Committee considers that where Parliament is provided with insufficient advisory matter for it to exercise its legislative discretion this may be in breach of section 17(a)(vii) of the Parliamentary Committees Act 2003 (insufficiently subjects the exercise of legislative power to parliamentary scrutiny).

Inappropriate delegation of legislative power – Fees levied by Safety Director without relation to cost of providing service – Whether taxation (not fee for service) by means of subordinate instrument

The Committee considers that a fee making provision which is not related to recovering costs of providing a service may be characterised as a form of taxation and therefore the Committee considers that the proper authority for such a power should be found in primary legislation not as a discretionary executive power. Such a taxation power may constitute an inappropriate delegation of legislative power within the meaning of section 17(a)(vi) of the Parliamentary Committees Act 2003.

Charter report

Impairment discrimination – Barriers to accreditation for people found not guilty of certain offences on the basis of mental impairment – Whether discrimination – Whether reasonable limit

Summary: Clause 3(d) treats people in similar circumstances differently, by imposing barriers to accreditation on people who involuntarily commit crimes because of a mental impairment, but imposing no barriers on people who involuntarily commit the same crimes for other reasons that may affect public safety. It may therefore limit the Charter rights of people who have or had a mental impairment to equal protection of the law without discrimination. The Committee is concerned that there may be 'less restrictive means reasonably available to achieve the purpose' of protecting public safety.

The Committee notes that clause 3(3)(d)(i) & (ii) provides that people found not guilty of an offence on the basis of 'mental impairment ' are to be treated as if they had been found guilty of the offence for the purposes of the Bill. Such people hence become subject to the various special barriers for certain offenders to accreditation (or continuing accreditation) as operators of bus services under clauses 27, 28, 49 and 50. These clauses engage the Charter's right to equal protection of the law without discrimination on the basis of 'impairment'.

The Statement of Compatibility remarks:

> *In my view, the provisions do not amount to disability discrimination. This is because the accreditation decision or disciplinary action is not made on the basis of the*

> *person's mental impairment. Rather, the action is taken because of the fact of the person having committed the actus reus of the offence, and in the interest of public care and safety.*

However, the Committee observes that a finding of not guilty on the basis of mental impairment can be made even when the person's actions are involuntary, if the involuntariness was due to a mental impairment. By contrast, people who act involuntarily for other reasons, including intoxication, temporary psychosis or a disorder that does not qualify as a mental impairment (such as sleepwalking or automatism) will be acquitted. So, ***clause 3(d) treats people in similar circumstances differently, by imposing barriers to accreditation on people who involuntarily commit crimes because of a mental impairment, but imposing no barriers on people who involuntarily commit the same crimes for other reasons that may also affect public safety. The Committee therefore considers that clause 3(3)(d) may limit the Charter rights of people who have or had a mental impairment to equal protection of the law without discrimination****.*

The compatibility of clause 3(3)(d) with the Charter may depend on whether or not the barriers to accreditation for people found not guilty on the basis of mental impairment are reasonable limits on the right to equality according to the test in Charter s. 7(2). The Statement of Compatibility remarks:

> *[O]nly those found guilty of serious offences described in the bill as tier 1 offences, are excluded from accreditation or suspended on a mandatory basis. Tier 2 and 3 offences trigger discretion on the part of the Safety Director, which must be exercised compatibly with the Charter. Furthermore, a person may apply to VCAT for review of accreditation and certain disciplinary decisions by the Safety Director.*

While the Committee considers that these provisions reduce the limitation that clause 3(3)(d) may impose on the Charter's equality rights, ***the Committee is concerned that there may be 'less restrictive means reasonably available to achieve the purpose' of protecting public safety****. In particular, clauses 26, 48 and 50 empower the Director to reject any application or suspend or cancel any registration in a variety of circumstances relating to public safety, whether or not a crime was committed or why.*

The Committee will write to the Minister seeking further information as to whether or not the Director's general powers under clauses 26, 48 and 50 are a less restrictive means reasonably available to achieve the purpose of protecting bus passengers from people who are found not guilty of crimes on the basis of mental impairment. Pending the Minister's response the Committee draws attention to clause 3(3)(d)."

The Committee makes no further comment.

Minister's Response

I refer to your letter dated 4 February 2009 regarding this matter. Your letter requests my response to the matters raised in the Committee's report as tabled in the Legislative Assembly on 3 February 2009.

Lynne Kosky MP
Minister for Public Transport

30 March 2009

SARC queries the delayed commencement of some provisions in the Bill of up to two years.

RESPONSE

1. *The new Act will commence on 31 December 2010 if not proclaimed earlier. This lead time is necessary given the need for the development of new subordinate instruments to support the Act. This will involve developing a complex range of regulations requiring regulatory impact statements and extensive public consultation. Codes of practice are likely to be developed as well, and these will also require extensive consultation.*

2. *In addition, the Department will need to undertake an extensive range of implementation activities to support commencement of the new legislation, regulations and codes. These activities include staff training, IT changes, preparation of guidelines and circulars, and comprehensive multi media communications, which are likely to extend to seminars and presentations to industry participants.*

3. *It should be noted that recent experience with the introduction of the Rail Safety Act 2006, the Accident Towing Services Act 2007 and the new schemes for the accreditation of taxi industry participants and commercial passenger vehicle drivers under the Transport Act 1983, which were schemes of similar size and complexity, shows that up to two years is required to achieve an effective transition to a major new regulatory regime.*

4. *During this period of time, the bus industry and the proposed regulator, the Director, Public Transport Safety, will need to become familiar with significantly changed regulatory requirements. Industry will consider the new risk-based approach to safety, and the Safety Director will prepare policies and procedures required to undertake the new regulatory task. One of the policies that will involve extensive consultation is the Compliance and Enforcement Policy.*

5. *The SARC Report appears to acknowledge this reasoning.*

SARC queries the adequacy of the explanatory material for clause 67(4) and requires further information on the Safety Director's power to set accreditation fees "without regard to the cost of the service..." and whether, in that case, the fees would amount to a tax.

RESPONSE

6. *Accreditation fees as set by the Safety Regulator will not amount to a tax.*

7. *The Bus Safety Bill simply replicates the methods used to calculate fees for service in other areas of the transport portfolio. Examples include:*

   - *Taxi and Hire car fees (S147B of the Transport Act 1983).*
   - *Accreditation fees (Rail Safety Act 2006).*
   - *Fees for over-dimensional vehicles crossing tracks (S221ZA of the Transport Act 1983).*
   - *Towing industry fees (Accident and Towing Services Act 2007).*

8. *Fees under the Bus Safety Bill will be developed in light of the guidelines for full cost recovery issued by the Department of Treasury and Finance. It is intended that full cost recovery will represent the maximum which can be charged. It is likely that fees will fall short of full cost recovery, as occurs at present, as the annual 2007-08 fee revenue represented well less than 50% of the costs incurred by the regulator.*

9. *Further, in accordance with clause 67(3) of the Bus Safety Bill, the Safety Director will now be able to reduce or waive fees on reasonable grounds.*

10. *The purpose of clause 67(4) is simply to ensure that a higher fee is not automatically invalidated. Any possibility that may be perceived of fees being set without regard to the cost of the service provided is offset by the requirement under clause 67(5) that the Safety Director consult with operators and sectors of the industry that will be affected.*

SARC queries whether the Safety Director's powers under clauses 26, 48 and 50 meet the requirements under the Charter of Human Rights and Responsibilities for a less restrictive means of protecting bus passengers from people who are found not guilty of crimes on the basis of mental impairment.

Summary of response

11. *The Bus Safety Bill introduces a new scheme of bus operator accreditation, which reflects regulatory best practice. Given that the Bill deals with persons seeking to*

engage in providing public transport, safety is a paramount concern for the community and Government.

12. *This scheme is distinct from the scheme of commercial passenger vehicle (and bus) driver accreditation in the Transport Act 1983 ('Transport Act'), but the two schemes are similar.*

13. *The regulator's decisions about accreditation involve consideration of disqualifying offences which are listed in the Transport Act. For that purpose, each scheme deems a finding of mental impairment to be a finding of guilt. The "mental impairment" defence replaced the insanity defence but has the same meaning and is contained in the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 ('CMIUT Act').*

14. *A finding of mental impairment is a reliable indicator of a safety risk as is a positive finding of culpable guilt. This is the rationale behind the Working with Children Act 2005, on which several transport accreditation schemes are modelled.*

15. *Some medical conditions, such as intoxication or sleepwalking, may not constitute mental impairment and are therefore not deemed to be findings of guilt. However, such cases may still justify refusal of accreditation if the Director is satisfied that the person is not competent to safely operate a bus service. Any potential unfairness to the person seeking accreditation is avoided because all decisions can be reviewed by VCAT.*

16. *The Bill deliberately places public safety considerations at the centre of regulation of the bus industry. This reflects the Government's commitment to safety for all Victorians and in particular those travelling on public transport, including when catching a bus.*

Detailed response

Background

17. *The accreditation scheme under the Bus Safety Bill reflects regulatory best practice. Primary consideration is given to the safety of the travelling public.*

18. *The relevant objects of the Bill are set out in clause 4(1). The objects include promoting the safety of bus services, effective management of safety risks in bus services and continuous improvement in bus safety management. Importantly, the Bill also promotes public confidence in the safety of the transport of passengers by bus and the development of a safety culture among persons who participate in the provision of bus services.*

19. *As I observed in the Statement of Compatibility for the Bill, the purpose of the accreditation scheme introduced by the Bill is to attest that a person who operates a commercial bus service or local bus service can continue to demonstrate that they have competence and capacity to manage risks to safety associated with operating these services.*

20. *A feature of the accreditation scheme for operators of bus services is a series of disqualifying offences which can have the effect of disqualifying a person from becoming accredited (or retaining accreditation). In this respect, the Bill is based on the Working with Children Act 2005, to promote its prime purpose, namely, "to provide for the safe operation of bus services in Victoria".*

21. *For a disqualifying offence to influence an accreditation decision there must have been a "finding of guilt". For this purpose, clause 3(3) provides an expansive definition of findings of guilt. In particular, paragraph (d) deems a finding of "mental impairment" to be a finding of guilt.*

22. *This provision constitutes a reasonable limitation on the charter right against discrimination and to equal protection of the law.*

23. *In its decision-making structure and its reliance on disqualifying offences, the Working with Children scheme has been used as a model for several transport portfolio accreditation schemes, including the taxi industry accreditation scheme and commercial passenger vehicle and bus drivers scheme under the Transport Act and*

the scheme for accident towing operators and drivers under the Accident Towing Services Act 2007.

24. *The Government considers that the Working with Children scheme, and the transport portfolio accreditation schemes which draw on it, reflect community standards while at the same time balancing individual rights.*

Issue raised by SARC - deemed "finding of guilt"

25. *SARC has made comments in relation to the provision - clause 3(3)(d) - which, in relation to disqualifying offences, deems findings of mental impairment to be findings of guilt. The comment is that this provision treats persons found not guilty because of mental impairment differently from persons found to have acted involuntarily ("automatism") due to a mental illness short of mental impairment. The SARC comment particularly mentions the phenomenon of sleepwalking.*

26. *The deeming provision, and the Working with Children Act provision on which it is modelled, reflect both the common law, in its treatment of the defence of insanity, and the CMIUT Act' which replaced the common law defence of insanity with new provisions relating to "mental impairment".*

27. *In proving a person guilty of an offence, the prosecution must prove the actus reus (the guilty act, which must be a "voluntary" act) and then prove mens rea, ie that the act was carried out with a guilty state of mind. Automatism means there was no voluntary act, and the court need not consider whether or not there was "also" a guilty state of mind. If the automatism is not the result of mental impairment, the outcome is an unqualified acquittal.*

28. *A finding of mental impairment might negate either the actus reus ("insane automatism") or the mens rea (a voluntary act but no guilty state of mind). However, in each case, the finding of mental impairment leads to a qualified acquittal.*

29. *Here, insane automatism is simply a species of insanity where the insanity causes involuntary conduct. Insane automatism encompasses the limb of M'Naghtens Case[1] that the defendant "did not know the nature and quality of his act" due to a defect of reason resulting from a disease of the mind. This is now restated in section 20(1)(a) of the CMIUT Act using the term "mental impairment".*

30. *At common law, the qualified acquittal of insane persons resulted in defendants being detained "until the Governor's Pleasure was known". This system of detention "at the Governor's pleasure" was abolished on 18 April 1998 with the commencement of the CMIUT Act. Under the new scheme, mentally impaired defendants are subject to custodial or non-custodial supervision orders where nominal periods of detention and supervision are set by the Court or, alternatively, defendants are released unconditionally.[2]*

31. *By contrast, defendants who are found not guilty because of simple automatism ("sane automatism", ie in the absence of any mental impairment) are entitled to complete acquittal and must be released unconditionally.*

32. *SARC has specifically referred to the example of "sleepwalking" as a matter which engages the Charter right of discrimination. In Australia, courts generally treat this medical condition as a form of sane automatism resulting in complete acquittal.[3] The High Court in Jiminez[4] found that a driver who fell asleep while driving was acquitted of dangerous driving causing death because he was found to have acted involuntarily. Other forms of sane automatism remain complete acquittal defences under Victorian*

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1 (1843) 8 ER718 at 722.

2 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, section 23.

3 *R v Falconer* (1990) 171 CLR 30 at paragraph 7 per Deane and Dawson JJ; *Bratty v Attorney-General for Northern Ireland* (1963) AC 386 at 409; *R v Joyce* [2005] NSWDC 13 at paragraphs 40-43. Somnambulism has given rise to complex considerations for Courts in deciding cases particularly in Canada - see: *R v Parks* [1992]2 SCR 871; *R v Hawrelak* (1998) ABPC 7; *R v Luedecke* (2005) ONCJ 294; *R v Prescalt* (2008) ONCJ 604.

4 *R v Jiminez* (1992) 173 CLR 572.

law, such as the intoxication defence.[5] Such persons are not covered by the CMIUT Act.

33. *Accordingly, a finding by a court that a person acted with sane automatism (automatism without mental impairment) and a finding that a person acted with mental impairment are, and have always been, treated differently at law. The deeming provision in the Bus Safety Bill (and in the Working with Children Act) merely recognises and applies this distinction.*

Applicability of Charter

34. *The limitation on the right of equal protection before the law without discrimination is justified because the limitation reflects the common law and the current position in the Court's criminal jurisdiction, More importantly, the limitation is necessary in the interests of public safety, In the cases concerned with mental impairment, there is a lawful deprivation of liberty because the finding of mental impairment justifiably gives rise to ongoing concerns about future behaviour, including safety or competence.*

35. *A less restrictive means of achieving the purpose of protecting public safety is not available as removal of the deeming provisions would be inconsistent with the common law and the CMIUT Act.*

36. *In this regard, section 8 of the Charter aligns with the Equal Opportunity Act 1995, To amount to direct discrimination there must be less favourable treatment of a person with a disability who is in "the same or similar circumstances" as a person without a disability, Under the Purvis[6] approach the person is not being treated less favourably because of their impairment: rather, they are treated differently because they have committed the physical element of the offence,*

37. *Put another way, a person found to have a mental impairment is not in "the same or similar circumstances" as a person who is not found to have impairment. The deeming provisions exist because the physical element of the offence was committed by a mentally impaired person and, due to the mental impairment, the offending conduct is prone to recur.[7] The Bus Safety Bill continues the Purvis approach and simply applies it to a different context.*

38. *Because ongoing considerations of public safety exist in relation to such persons with a mental impairment, the limitation on the right against discrimination is important and justified given that such persons are here seeking to work in public transport.*

39. *The limitation on this human right has been justified on the ground of public safety by the courts in the following way[8]:*

    The very availability of a verdict of *"not guilty on the grounds of mental illness"* [sic] and the legislation providing for the detention of those found not guilty on those grounds until it is safe for them to be released, demonstrate the importance of the policy that society desires to be *protected from further misconduct* by those who have committed offences whilst mentally ill. (emphasis added)

40. *Further, an acquittal by reason of mental impairment is readily discoverable because reasons for the decision are given and placed on a public record, which can be readily accessed.[9] This is not necessarily so for cases of sane automatism where the Safety Director would have to make inquiries with the court or the prosecution agency regarding the reason for acquittal. In jury trials, the response to the inquiry is largely conjectural.*

41. *To conclude, the deeming provision in the Act reflects the long standing position at law that persons found not guilty due to mental impairment must be treated in a manner that gives primary consideration to public safety, The Act reflects the position in a way*

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5 *R v O'Connor* (1980) 146 CLR 64.

6 *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92.

7 *R v Falconer* (1990) 171 CLR 30.

8 *R v Joyce* [2005] NSWDC 13 at paragraphs 46 and 48.

9 *Crimes (Mental impairment and Unfitness to be Tried) Act 1997*, sections 23-24.

that is both reasonable and proportionate and which is consistent with both public safety and human rights considerations.

Related issue – safety concerns without guilt of disqualifying offence

42. *SARC observed that cases of sane automatism which ordinarily involve medical conditions such as intoxication, temporary psychosis or disorder, are not covered by the deeming provision, even though equal concerns about public safety may exist.*
43. *While it is true that such persons are not deemed guilty of a disqualifying offence, the Safety Director may nonetheless address public safety concerns in those cases through other statutory means.*
44. *Under the Bill the Safety Director a general discretion to refuse an accreditation. The discretion to refuse an accreditation under clause 26(1) is exercised on the basis of the applicant's ongoing competence and capacity to operate the service. Ongoing sane automatism, or ongoing concerns about possible recurrence of episodes of sane automatism, could justify a discretionary refusal.*
45. *Further, the Bill gives VCAT broad scope for review of accreditation decisions. The tribunal effectively has the power to make its own decision having the same powers as the Safety Director. The tribunal can vary the terms of the decision (such as altering a condition or changing a disqualification period or replacing cancellation with a suspension), confirm the decision or dismiss the application by the aggrieved person.*
46. *The capacity of an applicant to seek administrative review by VCAT under the accreditation scheme involves the balancing of the rights of the individual against the interests of the public in maintaining acceptable public safety standards.*

Conclusion

47. *The public interest in safety justifies a provision which constitutes a reasonable restriction on a right against discrimination.*
48. *The relevant provision is modelled in this instance on the Working with Children scheme. The provision reflects the long held legal exception to the right to equal protection of the law without discrimination in cases of mental impairment.*
49. *In this context, the government, reflecting regulatory best practice, has given paramount consideration to the safety of travelling public in the provision of public transport.*[10]

The Committee thanks the Minister for this response.

[10] Under Clause 28, an applicant may also apply for administrative review where VCAT refuses accreditation under clause 26, so applicants with sane automatism have an equal right to seek review.

Electricity Industry Amendment (Premium Solar Feed-in Tariff) Bill 2009

The Bill was introduced into the Legislative Assembly on 11 March 2009 by the Hon. Peter Batchelor MLA. The Committee considered the Bill on 30 March 2008 and made the following comments in Alert Digest No. 4 of 2009 tabled in the Parliament on 31 March 2009.

Committee's Comments

[2]

Delayed commencement – Inappropriate delegation of legislative power

The Committee refers to its Practice Note No. 1 concerning delayed commencement provisions exceeding one year from introduction in the Parliament. In such circumstances the Committee will seek to ensure that Parliament has sufficient information to determine whether a delay in commencement is justified.

The Committee will seek further information from the Minister.

Minister's Response

I refer to your letter dated 31 March 2009.

As noted in your letter, the Committee considered this Bill at its meeting on 30 March 2009 and has requested that I advise the Committee in respect to the Committee's questions and concerns of the delayed commencement of this Bill.

> *The Committee referred to its Practice Note No. 1 concerning delayed commencement provisions exceeding one year from introduction in the Parliament. In such circumstances the Committee will seek to ensure that Parliament has sufficient information to determine whether a delay in commencement is justified.*

I wish to advise the Committee that the delayed commencement of this Bill is to allow for the extra time that is required to enable operational matters which are necessary to be implemented by the industry before the Scheme can begin.

I apologise to the Committee for the inadvertent omission of that explanation from the Explanatory Memorandum and Second Reading speech as required by Practice Note No. 1.

Peter Batchelor MP
Minister for Energy and Resources

3 April 2009

The Committee thanks the Minister for this response.

Major Sporting Events Bill 2009

The Bill was introduced into the Legislative Assembly on 26 February 2009 by the Hon. James Merlino MLA. The Committee considered the Bill on 10 March 2008 and made the following comments in Alert Digest No. 3 of 2009 tabled in the Parliament later that day.

Committee's Comments

Charter report

Freedom of expression – Public life – Public speech at sporting events – Offence to possess large banners – Power to immediately exclude people who engage in unsafe, disruptive or interfering behaviour

Summary: A number of the bill's provisions may limit the ability of Victorians to engage in public speech (including political protests and other participation in public debate) at some sporting venues during major sporting events. The Committee is concerned that provisions criminalising the possession of all large banners in all sporting areas and venue and authorising officials to immediately expel people who engage in unsafe, disruptive or interfering behaviour may be unreasonable limits on Victorians' Charter rights to freedom of expression and to public life.

The Committee notes that a number of the bill's provisions may limit the ability of Victorians to engage in public speech (including political protests and other participation in public debate) at some sporting venues during major sporting events. These provisions engage the Charter rights of Victorians to freedom of expression and to public life.

The Statement of Compatibility remarks:

> *In relation to crowd management provisions, there are no less restrictive means available to achieve a safe and orderly environment at major sporting events. The behaviours that are proscribed are all unacceptable to event organisers, venue managers and the community for various reasons including the need for public order and safety. The minimum consequences of these behaviours – a direction to leave for 24 hours – is the least restrictive response that would achieve the purpose.*

While the Committee considers that the majority of the bill's limitations on public speech are proportionate ways of protecting compelling government interests, in particular the public enjoyment of sporting events, it is concerned about two provisions:

First, clause 62 makes it a criminal offence to possess 'prohibited items' at an event area or venue without authorisation. Item (l) of the definition of 'prohibited item' in clause 3 is:

> *a flag or banner which (i) is larger than 1 metre by 1 metre; or (ii) has a handle longer than 1 metre.*

This item does not appear in the equivalent provision of the Major Events (Crowd Management) Act 2003. Large banners are a potentially important form of public expression and can be used without significant disruption in some parts of sporting venues (e.g. in open areas or plazas surrounding stadiums.) Given that other clauses of the bill already prohibit behaviour that blocks views or disturbs or interferes with spectators or workers (e.g. by inappropriately placed banners), the Committee is concerned that additionally criminalising the possession of all large banners in all parts of sporting areas or venues may be an unreasonable limit on the rights to freedom of expression and public life. The Committee is also concerned that spectators (including overseas spectators) may be unaware that the possession of large banners and flags at sporting venues and areas is a criminal offence.

Second, clause 84 provides that an authorised officer may exclude a person from an event venue or area for 24 hours if the officer reasonably believes that the person is:

- *disrupting or interrupting a sporting event*
- *risking the safety of that person or other spectators*
- *causing unreasonable disruption or interference to spectators or workers*

While the Committee accepts that these are appropriate grounds for limiting expression (and welcomes the refinement of the current provision of the Major Events (Crowd Management) Act 2003), it is concerned that potential protesters will be unable to predict in advance what behaviours will lead to exclusion. The result may be that people are expelled for behaviour without realising that it was unsafe, disturbing or interfering, or may avoid acceptable expression to remove the risk of summary exclusion. The Committee therefore considers that clause 84 may result in unreasonable limits on the rights to freedom of expression and public life. In particular, the purpose of s. 84 might be reasonably achieved by a less restrictive means: if the power to expel only became available once the person had been warned that his or her behaviour was unacceptable and nevertheless persisted in it.

The Statement of Compatibility remarks:

> *It should be noted that these restrictions are not as great as the restrictions that may be imposed by land or venue managers, without the bill. Under clause 75 of the bill an individual may seek authorisation for some of these behaviours…*

The Committee observes that overseas courts have held that events or venues attended by large numbers of people are very significant to political speech, especially for people and causes without media access, so that even the exercise of property rights may infringe the right to freedom of expression. Given that the speech may be a protest against the event organisers or the government, authorisation and official discretion may not be sufficient mechanisms to avoid concerns about the rights to expression and public life.

The Committee considers that item (l) of clause 3's definition of 'prohibited item' and clauses 62 and 84 may be incompatible with the Charter's rights to freedom of expression and to public life.

The Committee will write to the Minister seeking further information as follows:

1. ***In light of other provisions barring obstruction of views and other disruptive behaviour, why is it necessary to criminalise the possession of all large banners at all parts of sporting areas and venues?***
2. ***What steps will be taken to make spectators (including overseas spectators) aware of the requirements of item (l) of clause 3's definition of 'prohibited item' combined with clause 62?***
3. ***Would empowering an official to expel a person only if they persist in behaviour after being asked to stop be a reasonably available less restrictive alternative to the present clause 84?***

Pending the Minister's response, the Committee refers to Parliament for its consideration the questions of:

1. ***Whether or not item (l) of clause 3's definition of 'prohibited item' and clause 62, by criminalising the possession of all large banners at all parts of sporting venues or areas, limits the Charter rights of Victorians to freedom of expression and participation in public life.***
2. ***Whether or not clause 84, by authorising officials to immediately expel people who engage in unsafe, disruptive or interfering behaviour, limits the Charter rights of Victorians to freedom of expression in public life.***
3. ***If so, whether or not these clauses are reasonable limits on Victorians' Charter rights and, in particular, whether there are less restrictive alternatives reasonably available to achieve the purpose of facilitating the public enjoyment of sporting events.***

The Committee makes no further comment.

Minister's Response

Thank you for your letter of 20 March 2009 regarding the Major Sporting Events Bill 2009 and the matters raised by the Committee in its Charter Report in Alert Digest No. 3.

This response addresses the matters raised by the Committee in turn.

1. In light of other provisions barring obstruction of views and other disruptive behaviour, why is it necessary to criminalise the possession of all large banners at all parts of sporting areas and venues?

Response:

The provisions barring obstruction of views and disruptive behaviour are not sufficient to deal with the range of issues associated with unauthorised use of large flags and banners. For example, a large flag or banner may be used in such a way that it obscures authorised, legitimate or paid signage without obstructing anyone's view or causing safety risks or unreasonable disruption or interference. Interference with legitimate signage may undermine the commercial arrangements for an event.

Allowing the display of a flag or large banner in one part of a venue where it may not obscure views or cause disruption and not in other parts of a venue would be impracticable as it would require some means of delineating the different areas in which this type of behaviour would be allowed and those where it would not be allowed. Such delineation would prove difficult or impossible. Even if possible, the delineation requirement would impose unreasonable expense and operational difficulties for event organisers in implementing a system of delineation and in its subsequent enforcement.

It is highly likely that if a flag or banner larger than 1 metre by 1 metre were to be used in a seating area without the agreement of other patrons seated nearby it would obstruct views or create safety risks or unreasonable disruption or unreasonable interference. While it would be possible to deal with obstructive, dangerous or disruptive use of large flags or banners under other provisions in the Bill, it is preferable to avoid situations in which it may become necessary to charge or eject a patron. It would also be capricious to allow people to bring items into a venue that they are not permitted to display (when that is the purpose of the item).

The prohibition of large flags and banners without authorisation is therefore based on a range of practical policy reasons designed to promote safety and an orderly environment at events and to protect commercial arrangements.

Finally, it should be noted that the maximum allowable size in the Bill for a flag or banner of 1 metre by 1 metre is substantially larger than the standard flags with club logos commonly used by spectators and is large enough to allow a message to be conveyed within a stadium should a patron wish to do so.

2. What steps will be taken to make spectators (including overseas spectators) aware of the requirements of item (l) of clause 3's definition of 'prohibited item' combined with clause 62?

Response:

The requirements typically form part of the conditions of entry that apply to the sale of tickets. The conditions are usually made available at the time of ticket purchase. In addition, although it is not specified on the face of the Bill, it is general practice for event organisers to specify prohibited items at the gate of major sporting events. Announcements may also be made over the public address system at venues regarding prohibited items. Authorised officers may request that a person surrender a prohibited item prior to entering the venue and, if the person refuses, may direct the person not to enter the event venue or event area. Under the Bill surrendered items must be stored at the venue and later returned to the person.

The Bill also provides for an authorised officer to request a person who is already in an event venue to surrender a prohibited item (again, to be stored at the venue and returned to the person). There are, therefore, various ways to make people aware of the fact that large flags and banners are prohibited and there are several opportunities to first encourage a person to surrender a prohibited item rather than be directed to leave or charged with an offence.

In practice, a penalty will only be operative where an individual ignores conditions of entry, then signage or announcements about prohibited items, gets an item past authorised officers to enter the venue and then refuses to surrender the item.

3. Would empowering an official to expel a person only if they persist in behaviour after being asked to stop be a reasonably available less restrictive alternative to the present clause 84?

Response:

Requiring an authorised officer to issue a warning to a person about particular behaviour before directing them to leave if they persist would undermine the objective of clause 84 and would not be practicable.

In practice it is likely that an authorised officer may give a person a warning about many of the behaviours that may trigger expulsion under clause 84 because it is in the interests of the all parties including the police and the event organiser to minimise the number of people who are directed to leave from an event. Directing a person to leave is an inherently stressful process for all concerned.

In some circumstances, however, it would not be appropriate to require a warning to be issued first, for example if a fight broke out in a crowded area. A fight would be dangerous to the protagonists and to others in the area as well as being unreasonably disruptive, and it would be unlikely to be resolved merely with a warning. Behaviour that is severe in its riskiness or disruptiveness warrants immediate removal of the responsible individual. Such behaviour could include actions that constitute offences under the bill or under other Acts. For example if a person were to throw a heavy object that might injure other people into a crowd, they may need to be removed immediately in addition to, or instead of, being charged with the offence for throwing projectiles. For this reason it is preferable to be able to issue a direction to leave immediately, rather than waiting for an individual to engage in further dangerous behaviour, before being able to remove him or her.

The provision is designed to provide authorised officers and police with the flexibility to regulate crowd behaviour in changing and sometimes volatile situations in addition to imposing penalties, or in situations where it may not be practicable or efficient to impose a penalty, if one is available.

It is unlikely that any reasonable person would be surprised to be directed to leave where they have engaged in behaviour that is disruptive of the event or dangerous or that causes unreasonable disruption or unreasonable interference to spectators or organisers. In practice this is likely to be limited to types of behaviour that are extreme. Further, announcements are sometimes made about types of behaviour that are prohibited such as invasion of the playing area or lighting of flares. It would be impractical to attempt to specify all the types of behaviour that may cause safety risks, disruption or interference in the Bill because there may be infinite variations of such potential behaviours.

A requirement to issue warnings would also create the potential for disputes and challenges about whether a warning had been issued and potentially a need to document warnings, which would not be practical in a crowd situation. It may also then create a focus on monitoring individuals who had been warned rather than monitoring the situation more broadly. It would effectively require a person who had been warned to then be monitored for the duration of their attendance at the sporting event. A warning may be issued by one authorised officer or police officer in one part of a venue. There is no way that all authorised officers or police officers at different times or at different locations could know which particular person had already received a warning.

Charter rights were considered carefully in relation to these aspects of the Bill in order to achieve an appropriate balance between the rights of individuals and the need to provide a safe and orderly environment for events for the benefit of all.

JAMES MERLINO MP
Minister for Sport, Recreation and Youth Affairs

30 March 2009

The Committee thanks the Minister for this response.

Salaries Legislation Amendment (Salaries Sacrifice) Bill 2009

The Bill was introduced into the Legislative Assembly on 2 December 2008 by the Hon. Tim Holding MLA and received Royal Assent on 11 December 2008. The Committee considered the Bill on 2 February 2009 and made the following comments in Alert Digest No. 1 of 2009 tabled in the Parliament on 3 February 2009.

Committee's Comments

Charter Report

Independent court or tribunal – Authorisation for judicial officers and tribunal members to enter into a salary sacrifice arrangement – Whether a negotiation over remuneration

Summary: Sections 3-5, 7-9 & 11-13 authorised various judicial officers and tribunal members to 'enter into an arrangement' to engage in salary sacrificing. The Committee is concerned that individual officers and members may now be required or permitted to negotiate with the executive about their remuneration. Such negotiations may limit the Charter right of litigants to a hearing before an 'independent' court or tribunal. The Committee will write to the Minister seeking further information about how salary sacrificing is arranged.

The Committee notes that ss. 3-5, 7-9 & 11-13, by amending other statutes, authorised various judicial officers and tribunal members to 'enter into an arrangement' to engage in salary sacrificing. *The amendments provide that such arrangements cannot be initiated, varied or revoked without a notice by the officer or member. However, the amendments do not identify whether or not any other conditions, including discretionary considerations, must be satisfied or whether processes must be followed before a salary sacrificing arrangement can commence.* ***The Committee is concerned that, if the consent of a member of the executive is necessary before officers and members can obtain the financial benefits of salary sacrificing, then individual officers and members may now be permitted or required to negotiate with the executive about their remuneration. Such negotiations may limit the Charter right of litigants to a hearing before an 'independent' court or tribunal.***

In relation to an equivalent right in Canada's Charter, that nation's Supreme Court has held:

> *[U]nder no circumstances is it permissible for the judiciary — not only collectively through representative organizations, but also as individuals — to engage in negotiations over remuneration with the executive or representatives of the legislature. Any such negotiations would undermine the appearance of judicial independence, because the Crown is almost always a party to criminal prosecutions before provincial courts, and because salary negotiations engender a set of expectations about the behaviour of parties to those negotiations which are inimical to judicial independence.*

The Court stated that its reasoning applies, not only to salaries, but to all 'benefits'.

Salary sacrificing is obviously beneficial to judicial officers and tribunal members; however, the Charter right to an independent court or tribunal is for the benefit of litigants, not officers or members. As the Supreme Court of Canada explained:

> *The purpose of the collective or institutional dimension of financial security is not to guarantee a mechanism for the setting of judicial salaries which is fair to the economic interests of judges. Its purpose is to protect an organ of the Constitution which in turn is charged with the responsibility of protecting that document and the fundamental values contained therein. If judges do not receive the level of remuneration that they*

would otherwise receive under a regime of salary negotiations, then this is a price that must be paid.

To avoid the risk of negotiation, the Canadian Court requires that all aspects of judicial remuneration be fixed by objective legal standards and that all alterations to those standards be preceded by a ruling from an independent commission.

The Committee will write to the Minister seeking further information as to whether or not the entry into an arrangement to engage in salary sacrificing requires the consent of a member of the executive, the exercise of a discretion or the application of uncertain legal rules.

Pending the Minister's response, the Committee draws attention to ss. 3-5, 7-9 and 11-13.

Minister's Response

I refer to your letter of 4 February 2009 regarding the concerns of the Scrutiny of Acts and Regulations Committee (SARC) in relation to the Salaries Legislation Amendment (Salary Sacrifice) Act 2008.

SARC has raised a concern that individual judicial officers may now be required or permitted to negotiate with the executive in relation to their remuneration. This concern is based on the phrase "enter into an arrangement" in the new provisions.

I am advised, however, that when all appropriate legislative provisions are considered together, SARC's concerns are not warranted. Section 82 of the Constitution Act 1975 (the Constitution) helps illustrate this.

Section 82(2) of the Constitution provides that a judge's salary is fixed under the Judicial Salaries Act 2004. Pursuant to section 82(6B) of the Act, this salary cannot be reduced. Subsection (4) provides, however, that a judge may agree to receive "the whole or part of his or her total amount of future salary as non-salary benefits". The subsection does not affect the total amount of salary referred to in section 82(2); the provision simply determines how much of that salary is to be 'sacrificed'. There is therefore no scope for negotiation on the part of either the judge or the Crown as to the quantum of the salary.

Inherent in the concept described above is the notion that the person receiving the salary enters into an arrangement with his or her employer for the employer to provide non-salary benefits of an equivalent value to the salary. Any legislation to provide for salary sacrifice therefore has to be expressed in terms of an arrangement to which the recipient of a salary agrees.

Therefore, it is the legislation itself that enables the creation of an arrangement; there is no role for the executive in determining either whether there is to be an arrangement or what the arrangement is. This being the case, the other issues raised by the Committee flowing from the initial concern do not arise.

TIM HOLDING MP
Minister for Finance, WorkCover and the Transport Accident Commission

20 April 2009

The Committee thanks the Minister for this response.

Serious Sex Offenders Monitoring Amendment Bill 2009

The Bill was introduced into the Legislative Assembly on 3 February 2009 by the Hon. Bob Cameron MLA. The Committee considered the Bill on 23 February 2009 and made the following comments in Alert Digest No. 2 of 2009 tabled on 26 February 2009.

Committee's Comments

Charter Report

Limiting rights – Procedure for deprivation of liberty – Extended supervision orders – Risk that 'cannot sensibly be ignored' – Whether demonstrably justified in a free society – Whether limitation 'under law' – Adequacy of statement of compatibility

Summary: The Act allows a court to make an extended supervision order if there is a risk of re-offending that 'cannot sensibly be ignored having regard to the nature and gravity of the possible offending'. The Committee is concerned that this test maybe too low for a significant rights limitation and may be overly susceptible to varying application amongst individual judges. The Committee is also concerned that the statement of compatibility does not address the factors set out in the Charter's test for reasonable limits on rights.

The Committee notes that s. 4 defined the term 'likely to commit a relevant offence' in s. 11 of the principal Act, with the result that ***a court can now impose an extended supervision order if it is satisfied that there is a risk that an offender will commit a relevant offence that:***

- *'is both real and ongoing'; and*
- ***'cannot sensibly be ignored having regard to the nature and gravity of the possible offending'***

As the Committee observed in its Alert Digest No. 5 of 2008, extended supervision orders involve a number of significant limits on Charter rights.

The Statement of Compatibility observes:

> *Section 7(2) of the charter requires a balance between the rights of offenders as well as the rights of the community, particularly potentially vulnerable victims including children. Whether it is reasonable and justifiable to impose restrictions upon rights of offenders depends not only on the likelihood of reoffending but also on the nature and gravity of the potential re-offending. In my view the test should reflect this, and enable ESOs to be made even where it cannot be proved that an individual is more likely than not to re-offend.*

While agreeing that protecting others' rights is a legitimate reason to limit an offender's rights, the Committee feels that s. 4 raised separate Charter concerns:

First, under the Charter all measures that limit rights, including those that promote others' rights, must be ones that 'can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'. The Committee observes that extended supervision orders, which impose significant rights limitations beyond those provided for by the criminal justice system, raise the question of the minimum threshold of risk that can ever justify such measures. One judge of the Court of Appeal recently held that there can be no justification for imposing significant limits on people who probably won't re-offend. While the Committee agrees with the statement of compatibility that extended supervision orders may be justifiable in such circumstances for very serious offences such as the rape of a child, ***the Committee is concerned that a threshold requirement that a risk 'cannot sensibly be ignored' may be too low for such significant rights limitations*** *in a 'society based on human dignity, equality and freedom'.*

Second, even for reasonable limits, the Charter requires that all rights restrictions be made 'under law' and specifically that 'a person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law'. ***The Committee is concerned that the test of whether or not a risk 'cannot sensibly be ignored' may be overly susceptible to varying application amongst individual judges****, based on their own views of what is and isn't 'sensible' in this unusual context. While all extended supervision orders are reviewed at least every three years and all decisions may be appealed, the Committee feels such processes may be too slow and onerous to prevent the development of significant discrepancies in the imposition of orders. The Committee is also concerned that the Victorian Court of Appeal, in ruling that the unamended legislation imposes a higher threshold, also held:*

If the undisputed opinion of the expert assessor was that the offender was likely to commit a relevant sex offence if released unsupervised, it is difficult to imagine on what other grounds a judge might fail to be satisfied that the likelihood existed.

Such deference to expert assessments of likelihood appears to be inappropriate in light of the new definition inserted by s. 4, which is much lower and contains a significant qualitative component. While the Court of Appeal will doubtless eventually review this remark, lower courts may, in the meantime, feel obliged to follow it in applying the new test.

Finally, ***the Committee is concerned that the statement of compatibility does not address the factors set out in Charter s. 7(2)****. In particular, there is no assessment of 'reasonably available' alternatives, such as the 'unacceptable risk' test recommended by the Victorian Sentencing Advisory Council. The Committee is also concerned that the statement of compatibility described the bill's provisions defining 'likely' as 'clarifying' that definition. The Committee observes that new test differs significantly from both previous interpretations by the Victorian Court of Appeal, by replacing a wholly quantitative assessment of probability with a partially qualitative risk assessment.*

The Committee will write to the Minister seeking further information as to whether or not the Court of Appeal's remarks on the 'undisputed opinion of the expert assessor' continue to bind judges applying the new test introduced in sections 4 and 5. It will also write expressing its concern about the statement of compatibility. Pending the Minister's response, the Committee draws attention to ss. 4 and 5 and the requirements of Charter ss. 7(2) and 21(3).

Retrospective penalties – Procedures for deprivation of liberty – Amendments apply to offences committed and orders made before commencement

Summary: The Committee reiterates its view that an extended supervision order may amount to a 'penalty' for the purposes of the Charter's right against retrospective increases in penalties. The Committee is also concerned that the changed rules for existing orders may be contrary to the procedural rights of persons subject to those orders.

The Committee notes that s. 4 amended rules that regulate whether or not 'eligible offenders' can be subject to an extended supervision orders. The change may result in some existing offenders being subject to orders that wouldn't have been made under the previous rules. The Committee is concerned that such changes in the law may cause significant unfairness, for example because some people may have decided to plead guilty on the basis of the legal advice about the state of the previous law.

The Statement of Compatibility remarks that:

> *…an ESO… does not impose a retrospective punishment on the offender contrary to section 27 of the Charter, because the making of an ESO is protective rather than punitive in nature (see especially Fardon v. Attorney-General (Qld) (2004) 223 CLR 575.)*

The Committee reiterates its observation, stated in Alert Digest No. 5 of 2008, that an extended supervision order may amount to a 'penalty' for the purposes of the Charter's right against retrospective increases in penalties. *Indeed, such a ruling was*

made in the very New Zealand case that developed the definition of 'likely' inserted by ss. 4 and 5.

The Committee also notes that s. 5 amended rules for when an extended supervision order can be renewed or revoked. If this change applies to people who are currently the subject of extended supervision orders, then orders made for a duration determined by the previous definition of 'likely' will now be subject to review under a different definition. ***The Committee is concerned that changing the rules for review or revocation of existing orders may be contrary to the Charter right of people presently subject to such orders not to 'be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law'.***

The Committee will write to the Minister seeking further information as to whether or not the amendments made by s. 5 apply to extended supervision orders in place prior to the Act's commencement date. Pending the Minister's response, the Committee draws attention to the retrospective operation of the Act.

Dialogue about human rights – Whether Charter operating as intended

Summary: The Committee will write to the Attorney-General expressing its concern about the operation of the Charter's human rights dialogue in relation to this Act.

The Committee notes that the Act is the first occasion where Parliament has responded to a major court judgment where the Charter was raised and extensively debated at the hearing. The Charter's intended operation in this circumstance was described at its enactment as follows:

> *It is a model which encourages and promotes dialogue about human rights between all the institutions of government -- the Parliament, the courts and the executive. It ensures that human rights are taken into account when developing new laws and policies. It ensures that the courts consider human rights when interpreting laws. And above all else, it promotes the need to respect and promote human rights across government and in the community.*

The Committee is concerned that the Charter may not have operated as intended in relation to this Act in three respects:

First, the majority of the Court of Appeal did not consider the Charter when interpreting the previous versions of ss. 11 and 23 of the principal Act. Rather, the majority held that its 'interpretative task does not attract the operation of s. 32(1) of the Charter'. The Committee observes that, as a result, the Parliament did not have the benefit of an authoritative judicial ruling on the compatibility of the existing ss. 11 and 23 with human rights when considering the enactment of amendments to those sections that lower the threshold for making extended supervision orders.

Second, the Bill's statement of compatibility did not follow the format used in other statements. In particular, as already outlined, the statement, despite concluding that the Bill limited some rights, referred only to the concept of balancing competing rights and did not address the factors set out in Charter s. 7(2)'s test for limiting rights. The Committee is concerned that the bill many not have complied with the requirement in Charter s. 28 that every bill be accompanied by a statement explaining 'how' it is compatible with human rights. The Committee considers that a fully compliant statement of compatibility is especially important when legislation that engages many human rights is developed and enacted speedily.

Third, the Bill was enacted without a report by this Committee. The Committee reiterates its concern stated in Alert Digest No. 1 of 2009 about non-compliance with Charter s. 30.

The Committee will write to the Attorney-General expressing its concern about the operation of the Charter's human rights dialogue in relation to this Act. Pending the Attorney-General's response, the Committee draws attention to Charter ss. 28, 30 and 32.

Minister's Response

Thank you for your letter of 26 February, in which you seek advice in relation to amendments to the Serious Sex Offenders Monitoring Act 2005 (the Act), contained in the Serious Sex Offenders Monitoring Amendment Act 2009 (the Amending Act).

As you would be aware, the Amending Act clarifies when an extended supervision order (ESO) can be imposed either at the first instance under s11 or upon review under s23. In particular, it provides that:

- *For the purpose of ss11 and 23 of the Act, an offender is likely to commit a relevant offence if there is a risk of the offender committing a relevant offence and that risk is both real and ongoing and cannot sensibly be ignored having regard to the nature and gravity of the possible offending.*
- *For the avoidance of doubt, ss11 and 23 of the Act permit a determination that an offender is likely to commit a relevant offence on the basis of a lower threshold than a threshold of more likely than not.*

A savings provision inserted into the Act by the Amending Act also clarifies that for the avoidance of doubt, ss11 and 23 as in force before the commencement day of the Amending Act are taken always to have permitted a determination that an offender is likely to commit a relevant offence on the basis of a lower threshold than a threshold of more likely than not.

I now turn to each of the questions and concerns directed to me in the Charter Report of Alert Digest No.2 of 2009, as tabled in Parliament on 24 February 2009.

1. Court of Appeal remarks regarding the 'undisputed opinion of the expert assessor'

In RJE v Secretary to the Department of Justice [2008] VSCA 265 ('RJE') the Court of Appeal (COA) said that 'the critical opinion which the [clinical assessment report] must express is an opinion on the very question which the court itself must decide – 'the risk that the offender will commit another relevant offence if released in the community and not made subject to an extended supervision order'.' The COA then went on to express the view that where matters of fact are not in contest, and an expert opinion is both cogent and unchallenged, a judge should ordinarily be slow to depart from the risk assessment which the expert has made.

The Charter Report expresses the concern that this manner of deference to expert assessments of the likelihood of an offender re-offending may be inappropriate in light of the new definitions inserted by ss4 and 5 of the Amending Act. The Committee has therefore queried whether, in the absence of a review by the COA, these remarks will continue to bind judges applying the new test.

While the judicial interpretation of the relevant amendments is obviously not a matter that is within my remit or control, in my view should it transpire that courts continue to be guided by the above remarks, notwithstanding that they were made in the context of the unamended test, this will not interfere with the operation of the amended test, or lead to an unfair result for the following reasons.

As the Committee has observed, the amendments introduce a new qualitative element to the test, pertaining to the nature and gravity of the offences an offender might commit if he or she were at liberty, unsupervised, and whether the relevant risk can sensibly be ignored. However, the court must still determine whether there is a real and ongoing risk that the offender will commit another relevant offence if released in the community and not made subject to an ESO. The court must also have regard to the type of offending that the offender might commit. In making a determination on these issues, the court is likely to receive considerable assistance from the expert evidence. There is no reason why courts should not be slow to depart from any expert opinion on these issues, if it is both 'cogent and unchallenged'. However, whether the relevant risk is one that can sensibly be ignored is ultimately an issue for the court to determine on a case-by-case basis.

2. Adequacy of the Statement of Compatibility

The Committee has expressed a number of concerns in relation to the adequacy of the Statement of Compatibility (SOC) for the Amending Act, as follows.

First, the Committee has expressed concern that the SOC does not address the factors set out in s7(2) of the Charter of Human Rights and Responsibilities Act 2006 ('the Charter'). As noted in the SOC, a previous SOC in relation to the Justice Legislation Amendment Bill 2008 comprehensively deals with the various rights of offenders that are either engaged or limited by the imposition of an ESO, including the right to liberty. In my view, the discussion of the limitation on offenders' rights in the previous SOC and the SOC for the Amending Act adequately address the key issues raised by s. 7(2) of the Charter.

A related concern to the above is that the SOC does not, in accordance with s7(2)(e) of the Charter, consider alternative amendments to the Act, such as amending the s11 test to be a new 'unacceptable risk' test.

I do not consider, however, that the Charter requires SOCs to address every conceivable way of amending legislation, irrespective of whether or not such amendments are realistic options for proper consideration. Rather, what s7 of the Charter contemplates is essentially a balancing exercise; while s28(3) requires a statement as to whether a bill is compatible and if so, how. I believe the SOC accords with these requirements.

Second, the Committee has expressed concern that the SOC describes the provisions of the Amending Act as 'clarifying', whereas the amendments are said to actually create a 'new test' that differs significantly from previous interpretations. I acknowledge that new subsection (2A) of ss11 and 23 represents a departure from previous interpretations of the test, insofar as it does introduce more of a qualitative element, in contrast to the purely quantitative approach hitherto taken by the courts. However, in my view, the relevant amendments are still best described as 'clarifying' the test, as they describe an interpretation that was open to the courts previously, having regard to the purpose of the scheme, to protect the community against offenders who pose a 'serious danger'.

Indeed, the form of words expressed in new subsection (2A) of ss11 and 23 is similar to the interpretation by courts in New Zealand (NZ) of the NZ test for extended supervision, which also requires that an offender is 'likely' to re-offend (see Belcher v Chief Executive of the Department of Corrections [2006] NZCA 262). I note that new subsection (2B) of ss11 and 23 is also consistent with what was previously said by the COA in TSL v Secretary to the Department of Justice [2006] VSCA 199.

3. Compatibility of amended test with the Charter

The Charter Report indicates two areas of concern for the Committee in relation to the Charter compatibility of the amended test.

First, the Committee has expressed concern that a threshold requirement that a risk 'cannot sensibly be ignored' may be too low for significant rights limitations.

The Charter requires the balancing of competing rights and interests. In the case of serious sex offenders, the rights of individual offenders need to be balanced against the rights and interests of community members. Community members' relevant rights include the rights of children to such protection as is in their best interests; the right of all persons to liberty and security; the right to equality; and the right not to be subjected to cruel, inhuman or degrading treatment. The amended test gives effect to this balancing exercise by directing courts to have regard not only to the likelihood of a further offence being committed, but the nature and gravity of the possible offending, and therefore the nature of the harm that is sought to be protected against. In this regard, the test provides a stronger relationship between the limitation of individual offenders' rights and the purpose of those limitations, namely the protection of the community, one of the factors to which regard must be had under s 7(2) of the Charter.

Further, in my view there is no reason why the expression 'cannot sensibly be ignored' should be attributed a 'low' threshold. Rather, the expression is qualified by the requirement that, in construing it, courts must have regard to 'the nature and gravity of the possible offending'. The relevant threshold therefore turns not purely upon a statistical risk assessment, but also requires an assessment of the level of harm an offender poses to the community if an order is not made in respect of that offender. I believe that the addition of such a qualitative threshold is appropriate, given the community protection purpose of the scheme.

A qualitative approach also ensures a fairer result for offenders. If, for example, having taken all of the evidence into account, a court finds that the nature and gravity of an offender's possible offending are not sufficiently serious to warrant the imposition of an ESO, the test will not be met. This is more likely to occur where type of offending does not involve significant risk of harm to members of the community. On the other hand, in cases in which an offender poses a moderate risk of committing further offences, but the offending can involve serious harm to potential victims, the test is likely to be met (see, for example Department of Corrections v Kingi, High Court of New Zealand, Wanganui Registry, CRI 2007-488-14 (7 February 2008)). In such circumstances it is entirely reasonable to impose limitations on an offender's individual rights through the imposition of the automatic conditions in s15 of the Act, and any other directions that may be necessary to adequately protect the community or for the rehabilitation, care or treatment of the offender, as determined by the Adult Parole Board under s 16 of the Act in each particular case.

Second, the Committee has expressed a concern that the expression 'cannot sensibly be ignored' may be overly susceptible to varying application amongst individual judges.

As noted, this expression enables courts to take into account all relevant matters and to avoid imposing orders on the more arbitrary basis of a quantitative risk assessment only. As I mentioned above, the form of words expressed in the new subsection (2A) is similar to the NZ test and courts in NZ must also consider whether or not the level of risk posed by an offender 'cannot be sensibly ignored'. This test has been applied without difficulty both in the NZ Court of Appeal (R v Peta [2007] NZCA 28 and Barr v Chief Executive of the Department of Corrections, Court of Appeal of New Zealand, CA60/06 (20 November 2006)), as well as in the NZ High Court (Chief Executive of the Department of Corrections v Waitere, High Court of New Zealand, Wellington Registry, CRI 2004-485-181 (9 December 2005). These judgments may also provide useful guidance to courts applying new subsection (2A) as may the judgment of Lord Nicholls of Birkenhead in Re H (Minors) [1996] AC 563 at 585.

4. Application of amendments made by s5 to ESOs in place prior to commencement of Amending Act

The Report indicates that if the amendments made by s5 of the Amending Act are intended to apply to ESOs in place prior to the commencement of the Amending Act, then the Committee wishes to bring to my attention the retrospective operation of those amendments.

I note that it is the intention that the amended s23 of the Act will apply to any future reviews of existing ESOs made prior to the commencement of the Amending Act. As discussed above, the amendments to s23 represent an interpretation that was open to the courts previously, having regard to the purpose of the scheme. Further, they are consistent with what was previously said by the Court of Appeal (in TSL v Secretary to the Department of Justice [2006] VSCA 199), and thus with the way in which the test was previously applied, prior to the COA's decision in RJE.

Strictly speaking, legislation is retrospective if it alters rights or liabilities created by the past actions of litigants. The right to review in this case only arises on application. Further, an amendment which alters the procedures to be applied to enforce rights and liabilities is not considered to alter rights and liabilities: the general rule that an amending enactment is prima facie to be construed as having a prospective operation only is not considered to apply to 'procedural' statutes which operate in relation to proceedings with respect to

causes of action accruing before the enactment (Fisher v Hebburn (1960) 105 CLR 188, 194 per Fullagar J; Maxwell v Murphy (1957) 96 CLR 261, 267 per Dixon CJ). The amendments to s23 determine the manner in which existing rights or duties may be enforced, rather than alter existing rights and liabilities. Consequently, s23 does not fall within the application of the presumption against retrospectivity.

Thank you for bringing these important matters to my attention and for giving me the opportunity to respond to the Committee's questions and concerns.

Bob Cameron MP
Minister for Corrections

22 April 2009

The Committee thanks the Minister for this response.

Transport Legislation Amendment (Driver and Industry Standards) Bill 2009

The Bill was introduced into the Legislative Assembly on 3 December 2008 by the Hon. Lynne Kosky MLA. The Committee considered the Bill on 2 February 2009 and made the following comments in Alert Digest No. 1 of 2009 tabled on 3 February 2009.

Committee's Comments

Charter report

The Committee notes that this Act raises the same concerns in relation to compliance with Charter s. 30 as those raised by the Committee in relation to the Salaries Legislation (Salary Sacrifice) Act 2008.

The Committee will therefore also write to the Attorney-General seeking the same information in relation to the Transport Legislation Amendment (Driver and Industry Standards) Bill 2008.

Impairment discrimination – Barriers to accreditation for people found not guilty of certain offences on the basis of mental impairment – Whether discrimination – Whether reasonable limit

Summary: Section 9 raises the same human rights concerns that the Committee raises in its report on clause 3(3)(d) concerning the Bus Safety Bill.

The Committee notes that s. 9, amending s. 163(1)(d) of the Transport Act 1983, extended an existing rule that equates people found not guilty on the basis of 'mental impairment' are to be treated as if they were found guilty for the purposes of the 'driver accreditation' provision of the Act. Such people hence became subject to the various special barriers for certain offenders to accreditation (or continuing accreditation) as operators of commercial passenger vehicles under ss. 169, 169E & 169F of the Transport Act 1983. ***Section 9 raises the same human rights concerns that the Committee raises in its report in this Alert Digest on clause 3(3)(d) concerning the Bus Safety Bill****.*

The Committee will write to the Minister seeking further information as to whether or not the Director's general powers to refuse or cancel registration are a less restrictive means reasonably available to achieve the purpose of protecting taxi passengers from people who are found not guilty of crimes on the basis of mental impairment. Pending the Minister's response the Committee draws attention to s. 9.

Presumption of innocence – People charged with certain offences cannot be accredited unless they demonstrate that the accreditation is appropriate having regard to public care – Not addressed in statement of compatibility

Summary: The Committee considers that s. 11(2) engaged the Charter's right to be presumed innocent. The Statement of Compatibility did not address this section. The Committee will write to the Minister seeking further information as to whether and how s. 11(2) was compatible with the Charter.

The Committee notes s.11(2), which amended s. 169 of the Transport Act 1983, extended barriers to accreditation for people convicted of 'tier 2' offences to people charged (but not convicted) of 'tier 1' offences. The Director is now barred from accrediting such people unless they demonstrate that accreditation 'is appropriate having regard to the public care objective' (which is that commercial vehicle services be provided with safety, comfort, amenity and convenience; and be carried out without fraud or dishonesty.) ***The Committee considers that s. 11(2) engaged the Charter right of such persons to be presumed innocent of their charges until proved guilty****.*

While the statement of compatibility addressed sections of the Act that applied to people found not guilty on the basis of mental impairment (who do not have the right to be

presumed innocent), ***the statement did not address whether and how s. 11(2) (which covers people who are currently criminal defendants) is compatible with the Charter****.*

The Committee reiterates its view that, while treating a charged person differently because of the events or evidence that led to their charge is compatible with the Charter, disadvantaging a person because of the mere fact that they are charged may limit their Charter right to be presumed innocent. Even if this principle is limited to public pronouncements that suggest that a person is guilty, the Committee is concerned that s. 11(2) amounts to a public pronouncement by the legislature that people are presumed to be a threat to public safety or amenity merely because they have been charged with tier 2 offences. The Committee observes that the accreditation provisions of the Bus Safety Bill 2008 do not contain an equivalent presumption and instead merely permit the Director to postpone an accreditation decision where the outcome of a charge may be relevant to that decision.

The Committee will write to the Minister seeking further information about whether and how s. 11(2) was compatible with the Charter. Pending the Minister's response, the Committee draws attention to this section.

The Committee makes no further comment.

Minister's Response

I refer to your letter dated 4 February 2009 regarding this matter. Your letter requests my response to the matters raised in the Committee's report as tabled in the Legislative Assembly on 3 February 2009.

Recent amendments to the Transport Act 1983 made by the Transport Legislation Amendment (Driver and Industry Standards) Act 2008 establish more stringent accreditation schemes for commercial passenger vehicle drivers and taxi industry participants namely taxi-cab licence holders, operators and providers of network services. The accreditation schemes are set out in Divisions 4 and 6 of Part VI of the Transport Act.

The proposal was put before Parliament primarily due to public safety concerns. The proposal balances public and individual considerations, including human rights issues arising under the Charter of Human Rights and Responsibilities Act 2006.

Lynne Kosky MP
Minister for Public Transport

30 March 2009

SARC seeks further information as to whether or not the Director of Public Transport's general powers under the Transport Act 1983 to refuse or cancel accreditation(s) are a less restrictive means reasonably available to achieve the purpose of protecting taxi passengers from people who are found not guilty of crimes on the basis of mental impairment.

Summary of response

1. *The Transport Legislation Amendment (Driver and Industry Standards) Act 2008 ('the Act') strengthens the accreditation schemes for commercial passenger vehicle (including taxi) driver and taxi industry participants. This reflects regulatory best practice. Given that the Act deals with persons seeking to engage in providing public transport, safety is a paramount concern for the community and the Government.*
2. *The Director of Public Transport's ('the Director') decisions about accreditation involve consideration of disqualifying offences which are listed in the Transport Act. The schemes deem a finding of mental impairment to be a finding of guilt in relation to these offences.*
3. *The "mental impairment" defence replaced the insanity defence but has the same meaning and is contained in the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 ('CMIUT Act').*

4. *A finding of mental impairment is a reliable indicator of safety risk as is a positive finding of culpable guilt. This is the rationale behind the Working with Children Act 2005, on which several transport accreditation schemes are modelled.*

5. *Some medical conditions, such as concussion or sleepwalking, may not constitute mental impairment and are therefore not deemed to be findings of guilt. However, such cases may still justify refusal of accreditation if the Director is satisfied that the person may not provide a safe service and is therefore not suitable to be accredited. Any potential unfairness to the person seeking accreditation is avoided because all decisions can be reviewed by the Victorian Civil and Administrative Tribunal ('VCAT).*

6. *A significant component of the amendment is that VCAT is directed to give paramount consideration to the public interest in safety when reviewing decisions about driver accreditation including any unjustifiable risk.*

7. *The Act deliberately places public safety considerations at the centre of regulation of the taxi industry. This reflects the Government's commitment to safety for all Victorians and in particular those travelling on public transport, including when travelling in a taxi.*

Detailed response

Background

8. *The driver accreditation and taxi industry schemes under Divisions 4 and 6 of Part VI of the Transport Act 1983 (Transport Act') reflect regulatory best practice. Primary consideration is given in the schemes to the safety of the travelling public. The schemes also detail specific character considerations in the form of listed disqualifying offences. This approach replaced the previous generalist "fit and proper" test which applied before 2006 in relation to the former commercial passenger vehicle driver certification scheme. That test had been criticised during scrutiny over previous years for imprecision and reliance on regulator discretion.*

9. *These approaches were strengthened by the amendments made by the Act.*

10. *The relevant purposes of the respective accreditation schemes are set out in sections 130 and 164 of the Transport Act.*

11. *The objects in the Act include promoting the safety of commercial passenger vehicle services (which includes taxis) and the provision of reliable and efficient services that meet reasonable community expectations. Importantly, the Act also seeks to promote public confidence in the safe transport of passengers by commercial passenger vehicles and compliance with minimum safety standards among persons who participate in the provision of such services.*

12. *As quoted in the Statement of Compatibility, the Act was introduced to ensure the highest level of public safety in taxi industry accreditation and driver accreditation for commercial passenger vehicles.*[11]

13. *A feature of the accreditation schemes for both commercial passenger vehicle drivers and taxi industry participants is a series of disqualifying offences which can have the effect of disqualifying a person from becoming accredited (or retaining accreditation). In this respect, the Transport Act is based on the Working with Children Act 2005, to promote its prime purpose, namely, to provide for the safe operation of taxi services in Victoria.*

14. *For a disqualifying offence to influence an accreditation decision there must have been a "finding of guilt". For this purpose, sections 130A and 163 provide expansive definitions of findings of guilt. In particular, each provision deems a finding of "mental impairment" to be a finding of guilt.*

15. *This provision constitutes a reasonable limitation on the charter right against discrimination and to equal protection of the law.*

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[11] Lynne Kosky, MP, *Transport Legislation Amendment (Driver and Industry Standards) Bill*, Legislative Assembly Hansard, 3 December 2008, page 4847.

16. *In its decision-making structure and its reliance on disqualifying offences, the Working with Children scheme has been used as a model for several transport portfolio accreditation schemes, including the taxi industry accreditation scheme, the commercial passenger vehicle driver scheme under the Transport Act and the scheme for accident towing operators and drivers under the Accident Towing Services Act 2007. I note that this relationship is to be continued for bus operators required to be accredited under the Bus Safety Bill which is currently before Parliament.*

17. *The Government considers that the Working with Children scheme, and the transport portfolio accreditation schemes which draw on it, reflect community standards while at the same time balancing individual rights. I summed this up in the second reading speech for the Bill by observing that -*

    The rights of an individual applicant cannot be the prime consideration in deciding who is a suitable person to be accredited to drive a taxi. Greater weight must be given to the rights of the many people who need to use taxi services, particularly the disadvantaged or vulnerable and those who have little or no alternative means of transport. Considerable weight must also be given to the importance of maintaining public confidence in the safety of taxi travel.

    The Government wants to make it absolutely clear to the community and the courts that a person who kills while insane is, in almost all conceivable circumstances, not a suitable person to drive a taxi. Extending mandatory refusal to such cases sends a clear signal to the regulator, the community and the courts.[12] However, the avenue of VCAT review remains available for all administrative decisions made by the accreditation regulator, both discretionary and mandatory.

Issue raised by SARC – deemed "finding of guilt"

18. *SARC has made comments in relation to the provisions of the Act – sections 4(3) and 9 - which, in relation to disqualifying offences, deem findings of mental impairment to be findings of guilt. The comment is that these provisions treat persons found not guilty because of mental impairment differently from persons found to have acted involuntarily ("automatism") due to a mental illness short of mental impairment. The SARC comment particularly mentions the condition of sleepwalking.*

19. *The deeming provision, and the Working with Children Act provision on which it is modelled, reflect both the common law in its treatment of the defence of insanity, and the CMIUT Act which replaced the common law defence of insanity with new provisions relating to "mental impairment".*

20. *In proving a person guilty of an offence, the prosecution must prove the actus reus (the guilty act, which must be a "voluntary" act) and then prove mens rea, ie that the act was carried out with a guilty state of mind. Automatism means there was no voluntary act, and the court need not consider whether or not there was "also" a guilty state of mind. If the automatism is not the result of mental impairment, the outcome is an unqualified acquittal.*

21. *A finding of mental impairment might negate either the actus reus ("insane automatism") or the mens rea (a voluntary act but no guilty state of mind). However, in each case, the finding of mental impairment leads to a qualified acquittal.*

22. *Here, insane automatism is simply a species of insanity where the insanity causes involuntary conduct. Insane automatism encompasses the limb of M'Naghtens Case[13] that the defendant "did not know the nature and quality of his act" due to a defect of reason resulting from a disease of the mind. This is now restated in section 20(1)(a) of the CMIUT Act using the term "mental impairment".*

23. *At common law, the qualified acquittal of insane persons resulted in defendants being detained "until the Governor's Pleasure was known". This system of detention "at the Governor's pleasure" was abolished on 18 April 1998 with the commencement of the*

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12 Lynne Kosky, MP, Second Reading Speech, *Transport Legislation Amendment (Driver and Industry Standards) Bill*, Legislative Assembly, Hansard, 3 December 2008, pages 4848-4849.

13 (1843) 8 ER718 at 722.

CMIUT Act. Under the new scheme, mentally impaired defendants are subject to custodial or non-custodial supervision orders where nominal periods of detention and supervision are set by the Court or, alternatively, defendants are released unconditionally.[14]

24. *By contrast, defendants who are found not guilty because of simple automatism ("sane automatism", i.e. in the absence of any mental impairment) are entitled to complete acquittal and must be released unconditionally.*

25. *SARC has specifically referred to the example of "sleepwalking" as a matter which engages the Charter right of discrimination. In Australia, courts generally treat this medical condition as form of sane automatism resulting in complete acquittal*[15]*. The High Court in Jiminez*[16] *found that a driver who fell asleep while driving was acquitted of dangerous driving causing death because he was found to have acted involuntarily. Other forms of sane automatism remain complete acquittal defences under Victorian law, such as the intoxication defence.*[17] *Such persons are not covered by the CMIUT Act.*

26. *Accordingly, a finding by a court that a person acted with sane automatism (automatism without mental impairment) and a finding that a person acted with mental impairment are, and have always been, treated differently at law. The deeming provisions in the Act (and in the Working with Children Act) merely recognise and apply this distinction.*

Applicability of the Charter

27. *The limitation on the right of equal protection before the law without discrimination is justified because the limitation reflects the common law and the current position in the Court's criminal jurisdiction. Most importantly, the limitation is necessary in the interests of public safety.*

28. *In the cases concerned with mental impairment, there is a lawful deprivation of liberty because the finding of mental impairment justifiably gives rise to ongoing concerns about future behaviour, including safety and fitness and health.*

29. *A less restrictive means of achieving the purpose of protecting public safety is not available as removal of the deeming provisions would be inconsistent with the common law and the CMIUT Act.*

30. *In this regard, section 8 of the Charter aligns with the Equal Opportunity Act 1995. To amount to direct discrimination there must be less favourable treatment of a person with a disability who is in "the same or similar circumstances" as a person without a disability. Under the Purvis*[18] *approach the person is not being treated less favourably because of their impairment: rather, they are treated differently because they have committed the physical element of the offence.*

31. *Put another way, a person found to have a mental impairment is not in "the same or similar circumstances" as a person who is not found to have impairment. The deeming provisions exist because the physical element of the offence was committed by a mentally impaired person and, due to the mental impairment, the offending conduct is prone to recur.*[19] *The Act continues the Purvis approach and simply applies it to a different context.*

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14 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, section 23.

15 *R v Falconer* (1990) 171 CLR 30 at paragraph 7 per Deane and Dawson JJ; *Bratty v Attorney-General for Northern Ireland* (1963) AC 386 at 409; *R v Joyce* [2005] NSWDC 13 at paragraphs 40-43. Somnambulism has given rise to complex considerations for Courts in deciding cases particularly in Canada – see: *R v Parks* [1992] 2 SCR 871; *R v Hawrelak* (1998) ABPC 7; *R v Luedecke* (2005) ONCJ 294; *R v Prescott* (2008) ONCJ 604.

16 *R v Jiminez* (1992) 173 CLR 572.

17 *R v O'Connor* (1980) 146 CLR 64.

18 *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92.

19 *R v Falconer* (1990) 171 CLR 30.

32. *Because ongoing considerations of public safety exist in relation to persons with a mental impairment, the limitation on the right against discrimination is important and justified given that such persons are here seeking to work in public transport in positions of considerable trust and will regularly have close contact with members of the public.*

33. *The limitation on this human right has been justified on the ground of public safety by the courts in the following way:*[20]

    The very availability of a verdict of "*not guilty on the grounds of mental illness*" [sic] and the legislation providing for the detention of those found not guilty on those grounds until it is safe for them to be released, demonstrate the importance of the policy that society desires to be *protected from further misconduct* by those who have committed offences whilst mentally ill. (emphasis added)

34. *Further, an acquittal by reason of mental impairment is readily discoverable because reasons for the decision are given and placed on a public record, which can be readily accessed.*[21] *This is not necessarily so for cases of sane automatism where the Director would have to make inquiries with the court or the prosecution agency about the reason for acquittal. In jury trials, the response to the inquiry is largely conjectural.*

35. *To conclude, the deeming provision in the Act reflects the long standing position at law that persons found not guilty due to mental impairment must be treated in a manner that gives primary consideration to public safety. The Act reflects the position in a way that is both reasonable and proportionate and which is consistent with both public safety and human rights considerations.*

Related issue – safety concerns without guilt of disqualifying offence

36. *SARC observed that cases of sane automatism which ordinarily involve medical conditions such as intoxication, temporary psychosis or disorder, are not covered by the deeming provision, even though equal concerns about public safety may exist.*

37. *While it is true that such persons are not deemed guilty of a disqualifying offence, the Director may nonetheless address public safety concerns in those cases through other statutory means.*

38. *Under the driver accreditation scheme for example, the Director may refuse, suspend or cancel an accreditation on the grounds that the applicant is not sufficiently fit and healthy to provide the service and/or does not satisfy the public care objective set out in the Act (see section 169(1)(a) and (b)).*

39 *However, if accreditation is granted by the Director in those cases, appropriate conditions may be imposed including that the person must be subject to periodic independent medical review.*[22] *I note that the Transport Act was specifically amended by the Act to ensure that the Director's power to impose conditions continues to include a power to require the applicant to undergo medical tests.*[23] *An applicant subject to a condition of ongoing sane automatism could conceivably require the imposition of such a condition in the interests of public safety.*

VCAT review

40. *Further, the Transport Act gives VCAT broad scope for review of accreditation decisions. The Tribunal effectively has the power to make its own decision having the same powers as the Director. The Tribunal can vary the terms of the decision (such as imposing a condition or changing a disqualification period or replacing cancellation with a suspension), confirm the decision or dismiss an application by an aggrieved person.*

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20 *R v Joyce* [2005] NSWDC 13 at paragraphs 46 and 48.

21 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, sections 23-24.

22 *Transport Act 1983*, s169A. Also see *Bus Safety Bill* Clauses 34 and 35 and *Transport Act*, section 133.

23 *Ibid*. Section 169A(2A).

41. *Significantly, the Act now requires VCAT to give paramount consideration to public safety in the most serious cases. When VCAT is reviewing a mandatory refusal or cancellation of driver accreditation (ie where a category 1 offence such as murder is involved), the tribunal is now required to give particular consideration to certain issues before overturning the Director's decision. Most importantly, paramount consideration is given to the importance of safety of the travelling public.*

42. *Section 169N(3) provides that VCAT cannot accredit an applicant in such cases unless satisfied of certain matters including –*

    - *the fitness and health and technical competence of the applicant to provide the service;*
    - *that the applicant meets the public care objective (which includes providing a safe service);*
    - *that the making of the order would not pose an "unjustifiable risk" to the safety of persons using services provided by the drivers of commercial passenger vehicles and private bus service; and*
    - *in all the circumstances, it is in the public interest to make the order.*[24]

43. *If so satisfied, the Tribunal can accredit an applicant, or restore a driver accreditation, despite the deeming provision and the category 1 offence.*

44. *The capacity of an applicant to seek administrative review by VCAT under the accreditation scheme involves the balancing of the rights of the individual against the interests of the public in maintaining acceptable public safety standards.*

45. *The amendments further the main theme of the Act which is the placing of public safety considerations at the core of the regulatory scheme both for the regulator in first instance and for the Tribunal on review. However, it does so in a way which is compatible with individual and human rights considerations.*

Conclusion

46. *The public interest in safety justifies provisions which constitute a reasonable restriction on a right against discrimination.*

47. *The relevant provision is modelled in this instance on the Working with Children scheme. The provision reflects the long held legal exception to the right to equal protection of the law without discrimination in cases of mental impairment.*

48. *In this context, the Government, reflecting regulatory best practice, has given paramount consideration to the safety of travelling public in the provision of public transport.*[25]

SARC seeks further information about whether and how section 11(2) of the Transport Legislation Amendment (Driver and Industry Standards) Act 2008 is compatible with the Charter.

Summary of response

49. *Section 11(2) amended section 169(3) of the Transport Act. The provision previously involved consideration by the Director of particular disqualifying offences, known as a category 2 offences (such as theft), in relation to applicants for accreditation as commercial passenger vehicle drivers. Where an applicant was found guilty of such offences the application was required to be refused unless the applicant demonstrated that he or she satisfied the "public care objective" set out in the Act.*

50. *The Act extended this provision to cases where the applicant is charged with a category 1 offence, such as murder. This provision only applies to commercial*

[24] Also see sections 136, 136A, 1690 of the *Transport Act* and Clause 58 of the *Bus Safety Bill*.

[25] Under sections 136 and 1690, an applicant may also apply for administrative review where VCAT refuses driver accreditation on grounds of fitness and health and/or general suitability, so applicants with sane automatism have an equal right to seek review.

passenger vehicle drivers. It would not apply, for example, to bus operators under the current Bus Safety Bill, because unlike the commercial passenger vehicle drivers, bus operators have minimal contact with the public.

51. *SARC observed that this provision was not addressed in the Statement of Compatibility for the Bill in relation to the Charter right to the presumption of innocence.*

52. *The right was not addressed in the Statement because the presumption of innocence only applies in relation to criminal matters. The right does not apply in relation to administrative decisions of the type provided by the Transport Act for application to the commercial passenger vehicle drivers accreditation scheme.*

53. *SARC also commented on the differences in the approaches to assessing the relevance of disqualifying offences under the Transport Act and the Bus Safety Bill.*

54. *While differences exist, the differences are not material. The same considerations regarding the offence will apply, such as the nature and gravity of the charge and whether a finding of guilt would be relevant to the decision.*

Detailed response

The amendment

55. *Section 11(2) of the Act amended section 169(3) of the Transport Act. Before the amendment commenced, the provision stated that the Director must not issue or renew a driver accreditation if the Director is aware that the applicant has been found guilty of a category 2 offence unless the Director is satisfied that the applicant has demonstrated that the issue or renewal of accreditation is appropriate having regard to the public care objective.*

56. *An example of a category 2 offence is theft. Section 11(2) amended this section by further providing that where the applicant was charged with (not found guilty of) a category 1 offence, the Director must refuse the application unless the applicant demonstrated that he or she satisfied the public care objective. Therefore, the application may be refused while the charge is still to be heard and determined by a court.*

57. *The reason a category 1 charge is inserted as part of a presumptive refusal provision under section 169(3) is that it relates to the most serious criminal offences such as murder, rape and terrorism. The new provision supplements section 169(2)(b) which obliges the Director to refuse accreditation to an applicant who has in the past been found guilty of a category 1 offence, and section 169E which obliges the Director to cancel the accreditation of a driver who is subsequently found guilty of such an offence.*

58. *The new provision applies the same reasoning to an applicant who is facing a category 1 charge at the time of the application. Consequently, continuing the general theme of the Act, public safety is the paramount concern where such a charge is laid against a person who seeks to drive a commercial passenger vehicle.*

Issue raised by SARC - Presumption of innocence

59. *Despite the impact of the charge on the Director's accreditation decision, it was unnecessary to consider section 11(2) of the Act in the Statement of Compatibility. This is because the provision does not directly engage the section 25(1) Charter right of the presumption of innocence.*

60. *The right to the presumption of innocence only applies to criminal proceedings (see Sebat v Medical Practitioners Board of Victoria[26]). It does not relate to administrative decisions of this type.*

61. *The medical practitioner in the Sebat case was charged with sexual offences and his registration was suspended by the Medical Practitioners Board. The relevant*

[26] [2008] VSC 346

proceedings under Division 6 of Part VI of the Transport Act are, like those before the Medical Practitioners Board in Sebat, administrative in nature rather than criminal, and therefore the Charter right does not apply.

62. *It is important to note that the effect of the charge in each case on the individual's registration/accreditation is temporary pending the outcome of the charge. Similarly, the impact on the accreditation process here is not premised on any presumptive view that the applicant is guilty of the charge, but rather on the view that the charge is so serious in its nature that the possibility of the applicant being found guilty is significant enough to affect the process. This impact is designed to support the central "public care objective" in the Transport Act (in particular, the safety of vulnerable passengers), which underpins the driver accreditation scheme (section 164, 169(1)(a)).*

63. *Section 169(3) does amount, as SARC has suggested, to a public pronouncement by the legislature that people are presumed to be a threat to public safety or amenity merely because a person has been charged with a category 1 offence. In this respect, it is important to note that the presumption is rebuttable by the applicant during the accreditation process and as necessary by VCAT on review. In other words, concerns about public safety are addressed and allayed by rebutting the presumption.*

64. *The section reflects the proper administrative consideration that the events leading to the laying of the charge are a relevant consideration as to whether the applicant satisfies the public care objective and the applicant's suitability in other respects to be accredited.*

65. *Section 169(3) vests discretionary power in the Director and the applicant has a legal right to be heard and to convince the Director that he or she satisfies the public care objective despite the category 1 charge.*[27]

66. *It should be noted that section 169(3), as it relates to criminal charges, is modelled on section 13 of the Working with Children Act 2005, which also places a reverse onus on the applicant to satisfy the Secretary in relation to criminal charges.*

67. *The Working with Children scheme has, in recent years, also been replicated in accreditation schemes for taxi industry participants, commercial passenger vehicle drivers and accident towing operators and drivers. This alignment with the Working with Children Act is appropriate and should be maintained.*

Issue raised by SARC – no equivalent provision in Bus Safety Bill

68. *SARC commented that there is no equivalent of this provision in the Bus Safety Bill which is currently before Parliament.*

69. *The accreditation scheme in the Bus Safety Bill is for operators of bus services, not bus drivers. Bus drivers are among those affected by Division 6 of Part VI of the Transport Act, including section 169(3).*

70. *The Bus Safety Bill does not have an equivalent provision because of the relationship of the relevant industry participant to the public. Commercial passenger vehicle (including bus) drivers have regular and direct contact with passengers, including vulnerable persons, and therefore a direct relationship with the public, while bus operators have a less direct relationship as distinct from commercial passenger vehicle drivers.*[28]

71. *In this regard, the new bus operator accreditation scheme resembles aspects of the taxi industry accreditation regime under Division 4 of Part VI of the Transport Act which similarly does not have an equivalent to section 169(3) for category 1 criminal*

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27 cf. section 169K(2)(a).

28 This legal distinction does not exist between taxi drivers, and taxi operators and licence holders for tier 1 ***offences*** (as distinct from charges) under section 132E because often taxi drivers may own and operate the vehicle they drive. Where the operator or licence holder do not drive taxis there is therefore an arms length relationship but tier 1 offences still apply in the same manner remain due to seriousness of those classes of offences and public safety considerations are paramount.

charges. Like bus operators, taxi operators and licence holders are more removed from the public than drivers.[29]

72. *SARC also commented on the different approaches to assessing the impact of disqualifying offences under the Bus Safety Bill (bus operators) and the Transport Act (commercial passenger vehicle drivers and taxi industry participants).*

73. *The Transport Act provisions contain detailed assessment criteria, while the Bus Safety Bill has a general discretion based on whether the charge, if proven, would be relevant to the decision and contains an explicit power to postpone a decision because of the charge, which the Transport Act does not. However, in all accreditation schemes the decision maker's powers are discretionary.*

74. *The differences are not material. The basic considerations regarding the assessment of the alleged offence are effectively the same. The same considerations regarding the charge will apply, such as the nature and gravity of the charge and whether a finding of guilt would be relevant to the decision. In both schemes the decision maker could defer a decision about the accreditation until the charge is disposed of.*

Conclusion

75. *Accordingly, the right to the presumption of innocence is not directly engaged by this provision.*

The Committee thanks the Minister for this response.

Committee Room
4 May 2009

[29] Where a taxi driver is also accredited to hold and/or operate a taxi licence immediate safety concerns can still be addressed under both schemes. The driver accreditation regime in section 169K(2)(a) requires the driver accreditation be immediately suspended until the category 1 charge is disposed of or the accreditation is reinstated. Therefore it operates to deal immediately with the most direct public safety consideration (i.e. driving) where such a person is subject to a category 1 charge by way of an interim suspension. Equally, the taxi operator and licence holder accreditations may be subject to disciplinary action under section 135B(a), including immediate suspension under section 135C. In all cases the affected person may have the accreditation reinstated or the suspension lifted if he can satisfy the Director he or she meets the applicable public safety and public interest considerations.

Appendix 1
Index of Bills in 2009

Appendix 2
Committee Comments classified by Terms of Reference

This Appendix lists Bills under the relevant Committee terms of reference where the Committee has raised issues requiring further correspondence with the appropriate Minister.

Alert Digest Nos.

Section 17(a)

(vi) inappropriately delegates legislative power

Bus Safety Bill 2008	1, 5
Criminal Procedure Bill 2008	1, 3

(viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities

Bus Safety Bill 2008	1
Crimes Amendment (Identity Crime) Bill 2009	4
Justice Legislation Amendment Bill 2009	5
Major Sporting Events Bill 2009	3
Occupational Health and Safety Amendment (Emplyee Protection) Bill 2008	1
Road Legislation Amendment Bill 2009	5
Salaries Legislation Amendment (Salary Sacrifice) Act 2008	1
Serious Sex Offenders Monitoring Amendment Act 2009	2
Statute Law Amendment (Charter of Human Rights and Responsibilities) Bill 2009	4
Transport Legislation Amendment (Driver and Industry Standards) Act 2008	1

Section 17(b)

(i) and (ii) repeals, alters or varies the jurisdiction of the Supreme Court

Criminal Procedure Bill 2008	1
Equal Opportunity Amendment (Governanace) Bill 2008	1

Appendix 3
Ministerial Correspondence

Table of correspondence between the Committee and Ministers during 2008-09

Bill Title	**Minister/ Member**	**Date of Committee Letter / *Minister's Response***	**Alert Digest No. Issue raised / *Response Published***
Assisted Reproductive Treatment Bill 2008	Health	06.11.08 *08.12.08*	12 of 2008 *1 of 2009*
Major Crime Legislation Amendment Bill 2008	Attorney-General	02.12.08 *23.02.09*	15 of 2008 *3 of 2009*
Primary Industries Legislation Amendment Bill 2008	Agriculture	02.12.08 *10.03.09*	15 of 2008 *4 of 2009*
Relationships Amendment (Caring Relationships) Bill 2008	Attorney-General	02.12.08 *19.12.08*	15 of 2008 *1 of 2009*
Bus Safety Bill 2008	Public Transport	04.02.09 *30.03.09*	1 of 2009 *5 of 2009*
Criminal Procedure Bill 2008	Attorney-General	04.02.09 *23.02.09*	1 of 2009 *3 of 2009*
Occupational Health and Safety Amendment (Employee Protection) Bill 2008	Attorney-General	04.02.09	1 of 2009
Salaries Legislation Amendment (Salary Sacrifice) Act 2008	Finance	04.02.09 *21.04.09*	1 of 2009 5 of 2009
Transport Legislation Amendment (Driver and Industry Standards) Act 2008	Public Transport	04.02.09 *30.03.09*	1 of 2009 *5 of 2009*
Salaries Legislation Amendment (Salary Sacrifice) Act 2008 AND Transport Legislation Amendment (Driver and Industry Standards) Act 2008	Attorney-General	04.02.09	1 of 2009
Serious Sex Offenders Monitoring Amendment Act 2009	Corrections	26.02.09 22.04.09	2 of 2009 *5 of 2009*
Major Sporting Events Bill 2009	Minister for Sport & Recreation	20.03.09 *01.04.09*	3 of 2009 *5 of 2009*
Crimes Amendment (Identity Crime) Bill 2009	Attorney-General	31.03.09	4 of 2009
Electricity Industry Amendment (Premium Solar Feed-in Tariff) Bill 2009	Energy and Resources	31.03.09 *09.04.09*	4 of 2009 *5 of 2009*

Bill Title	**Minister/ Member**	**Date of Committee Letter / *Minister's Response***	**Alert Digest No. Issue raised / *Response Published***
Statute Law Amendment (Charter of Human Rights and Responsibilities) Bill 2009	Attorney-General	31.03.09	4 of 2009